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FROM
MR SIN
to
MR
BIG

To Dad, who would have been proud

FROM MR SIN to MR BIG

A HISTORY OF AUSTRALIAN DRUG LAWS

desmond manderson

Melbourne

OXFORD UNIVERSITY PRESS

OXFORD UNIVERSITY PRESS AUSTRALIA

Oxford New York Toronto
Delhi Bombay Calcutta Madras Karachi
Kuala Lumpur Singapore Hong Kong Tokyo
Nairobi Dar es Salaam Cape Town
Melbourne Auckland Madrid

and associated companies in
Berlin Ibadan

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First published 1993

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National Library of Australia
Cataloguing-in-Publication data:

Manderson, D. (Desmond).
From Mr Sin to Mr Big.

ISBN 0 19 553531 6.

1. Drug abuse—Government policy—Australia. 2. Drug abuse—Australia.
3. Drug abuse—Social aspects—Australia. 4. Drug abuse—Australia—History.
5. Drugs—Australia. I. Title.

362.290994

Typeset in Malaysia by Syarikat Seng Teik Sdn. Bhd.
Printed in Hong Kong by Nordica
Published by Oxford University Press,
253 Normanby Road, South Melbourne, Australia

in the Annual Report by Australia to the CND noted some use of 'Indian hemp'. 'The parties concerned are invariably members of the theatrical world' and the problem 'has not reached a stage beyond control', it was noted. By 1966 New South Wales reported fifty-seven cannabis 'addicts', compared with twenty-four addicted to morphine, nine to pethidine, two to cocaine and three to heroin. These were not the ageing 'therapeutic addicts' of days gone by. The following year, the New South Wales government expressed concern about the use 'amongst young people' of amphetamines (247 charges were laid), barbiturates (171), cannabis (100) and LSD (66). Over ninety-three per cent of 'drug addicts' reported that year were thirty-four years old or less.[9]

We do not have to believe that these figures gave an accurate description of drug use in Australia to realise that both drug use and the way it was perceived were changing dramatically. The situation was further exacerbated with the arrival in Sydney in the late 1960s of large numbers of young, alienated United States soldiers on rest and recreational leave from service in the Vietnam War, who brought with them, attracted, consumed, sold, and gave away considerable quantities of cannabis and heroin. By any reckoning there was an explosion in the use of these substances and in related police activity. New South Wales police arrested nine people on charges relating to the use or possession of drugs of addiction or prohibited drugs in 1959, thirty-one in 1965, ninety-eight in 1966, and 1151 in 1972. Cannabis arrests alone rose almost 1000 per cent between 1966 and 1969.[10]

The situation elsewhere in Australia changed more slowly. In 1967 only eighty-six addicts (plus thirty-seven prepared-opium users) were recorded in all the other States combined. Sixty-one were 'therapeutic addicts', including nineteen medical and allied professionals and ten 'housewives'. Just over eighty-three per cent were over thirty-four years old. But within a few years, the trend established in New South Wales applied throughout Australia. By 1974 only 7.4 per cent of addicts reported in Victoria were over thirty-five years old. Even the way 'addicts' were categorised had changed. There were apparently no 'medical and allied professionals' addicted to dangerous drugs, and the categorisation 'housewife' had vanished altogether. The government instead now noted the number of 'students' and 'unemployed' people involved in drug use.[11]

The legal fiction that had operated so well to protect 'therapeutic addicts' was unable to cope with the changing demography of drug use. Morphine, pethidine, opium (and occasionally heroin) 'maintenance' had operated successfully in Australia because of the small number of people with which it had dealt. In most jurisdictions it had operated without direct government involvement and always without publicity. But increased drug use in the 1960s made the operation of a semi-secret treatment modality based on individual medical discretion impractical, and public awareness of drug use made treatment issues a matter of public debate. Pressure for the end of this ad hoc approach grew.

In Queensland in the 1940s the bureaucratic institutionalisation of main-

tenance had given it claims to legitimacy, but in the 1960s the appropriation of power from the medical profession by the organs of government in the other States made a marginal method of treatment much more visible. The new Poisons Acts enacted in New South Wales and Victoria brought the situation in those States broadly into line with Queensland and South Australian law, and with Commonwealth policy dating back to the NH&MRC's Model Dangerous Drugs Act. In New South Wales, for example, no drug of addiction could be prescribed for longer than two months, or to an addict for any length of time, without the authority of the Director-General on the advice of a Medical Committee.[12] The effect of these provisions around Australia was that the maintenance of any person by the prescription of a drug of addiction required the approval of State health departments.

Institutionalisation and increased use brought the system of maintenance out into the open. Maintenance might have continued, publicly accepted rather than covertly carried out. But various factors combined to make such an open scheme of legal drug use unworkable and unpopular. In the first place, neither heroin nor cannabis *could* be used in the medical maintenance of addiction since, like prepared opium, the Commonwealth prohibited their importation. In New South Wales the prescription of these drugs for any purpose was also illegal.[13] Furthermore, the medical profession argued that maintenance of addicts was a form of 'treatment' exactly because the drug was physically addictive and deprivation caused withdrawal symptoms. This approach was inapplicable and nonsensical in the case of cannabis.

Although legal maintenance in Australia had often extended beyond 'therapeutic addicts'—Chinese opium smokers were the clearest, but by no means the only, example—the fact that many users had *originally* taken their drug of addiction for medical purposes had always been an important part of the justification of the system. It proved that they were not to blame for their suffering. In addition, most legally maintained addicts in Australia had been middle class and middle aged: part of the system and subservient to it. Young cannabis and heroin users on the other hand were different. Their very youth at once branded them as potential rebels, with less of a stake in the capitalist system and external to the places of power. Their use was intentional and therefore an immediate affront to the rule of law; it was recreational and therefore a challenge to medical dominance over drugs. Their drug use challenged medico–legal drug control as the morphine-dependence of their parents never had.

As the legal addicts of the previous generation died out, young illegal drug users were not considered as candidates to replace them. Some legally maintained addicts remained in Victoria in 1968, but the following year the government reported that the forty-two permits issued to allow doctors to prescribe drugs of addiction 'were for use in the treatment of recognised medical diseases only'. In Queensland, which was still at that stage confident in the correctness of its policy, twenty-four legal addicts remained as late as 1972. But soon, throughout Australia, the policy of prescribed maintenance became a part of history more conveniently forgotten.[14]

The Politicisation of Drugs from 1966

The growth of illegal drug use effectively sidelined the disease model of addiction. The rhetoric about drug laws, which had always pretended that drug users were criminal and deviant, now began to correspond more closely with reality. In the crisis atmosphere that began to develop, the cyclic nature of this kind of public concern over drug use was forgotten. The cocaine scare of the 1920s was scarcely a memory, the anti-Chinese opium campaign completely forgotten; drugs were, once again, seen as an entirely new threat to society requiring drastic and immediate action. To be seen to be 'doing something about drugs' was an essential element of every political platform and a short-cut to popularity.

Thus in 1967 two urgency motions on 'drugs' were debated in the New South Wales parliament, the first since 1923. What caused this upsurge in public concern? Not only the extent of drug use, but its wilful nature and the youth of users also threatened many people. The young were said to be endangered, but it was the young themselves who were felt to be the danger. Certainly Clarence Earl, in moving one of the urgency motions, was principally concerned about the 'moral decay' and 'increase in vice' in 'many of our citizens within the under 23 age group'.[15] Jack Renshaw, leader of the opposition and former Labor Premier, moving the other, emphasised the 'present danger to the moral fibre of many young Australians'. The days of quiet and bipartisanship, however, were over. His proposal for the establishment of a Royal Commission was derided in a debate characterised by rancour and pettiness. 'I do not like to be interrupted in the middle of an insult,' complained the Liberal Premier, Robin Askin.[16]

Marijuana, in particular, became a focus for political anger and action. Australian's fear and ignorance of it, so thoroughly inculcated by overseas propaganda during the Menzies era, was now further provoked by the enormous increase in use. Several other factors also combined to generate the hatred many felt towards the drug. First, marijuana use challenged the validity of drug controls as a whole. Cannabis is not a 'safe drug'; evidence on the damage it may cause to the reproductive system of both males and females, in particular, is still being collected. But it is not a narcotic like heroin, or addictive like tobacco. Time and again the extreme dangers attributed to it have been shown to be wrong and, in retrospect, bizarre. In the 1960s high levels of use coupled with the relative weakness of the arguments used to defend its legal status, seemed to be the thin edge of the wedge. If cannabis law was being questioned, what would be next? The shrillness of anti-cannabis advocates was in direct proportion to the threat that its use posed to the perpetuation of the status quo.

Why else was cannabis included with heroin as a drug with 'particularly dangerous properties' in schedule IV of the *Single Convention*? Not because of its medical dangers, but because of the dangers it posed to the integrity of the legal system. Its relative harmlessness was its most 'dangerous property'. Why was an article questioning the reasons for the international prohibition of

cannabis that appeared in the 1966 issue of the UN *Bulletin on Narcotics* the object of such vitriolic condemnation? Because cannabis was the weakest link in the international drug control regime. The CND's statements on cannabis over the years seemed designed principally to shore up the morale of the faithful. Having changed its yearly discussion of 'the problem of cannabis' to 'the question of cannabis' in 1959, the CND declared in 1966 that the problem was solved and the question answered. 'The subject could no longer appear on the agenda as the "question" of cannabis. There could be no question but that cannabis presented a danger to society.'[17]

In this climate of insecurity, it is not surprising that cannabis, which had been categorised as a 'dangerous drug' for many years and was proclaimed a prohibited import in 1956, was reclassified by the New South Wales government as a 'prohibited drug' like heroin, shortly after the enactment of the *Poisons Act 1966*.[18] This was an utterly pointless gesture. The only substantive change effected by the reclassification of cannabis was to prevent it being legally prescribed by doctors. But cannabis—unlike heroin prior to 1954—was not a commonly prescribed drug, nor was it ever used for the maintenance of addiction. The amendment therefore had no concrete effect. The sole purpose served by the government's action was to demonstrate its resolute belief that marijuana was a drug the evil and danger of which were on a par with heroin. This was a statement of its inflexible hostility.

Second, cannabis, more than any other 'illegal drug', challenged the power of the law. Users were not powerless addicts in need of medical treatment: they *chose* to smoke the drug and to break the law. And in that conscious illegality, they symbolically rejected society's right to require them to obey the legal system. In the development of Australian drug policy, each new law had emerged to shore up those that preceded it. The law was the law. But marijuana smoking challenged that attitude: it seemed to threaten the legal system as well as the drug-control system.

Third, and quite apart from these general implications, certain particular associations of marijuana itself seemed to condemn it to unique obloquy. In the 1930s, when White Americans feared a racial uprising by poor and oppressed Mexicans in the south-west of the United States, marijuana was said to 'remove the normal inhibitions of the individual' and unleash rage and violence. These alleged dangers, just like those associated with opium smoking in the past, were merely an expression of what the community feared about its users. In the 1960s marijuana became associated with a very different group of users: young, middle class, and White. The fears that it came to symbolise also altered to reflect the fear of change and radicalism that these users aroused. Far from promoting aggression, marijuana was said to result in 'dropping out, indolence, lowering of goals, alienation'. Its regular use was said to result in an 'amotivational syndrome'. At a joint Commonwealth/State Ministerial conference held in 1966, the Queensland Health Minister, S.D. Tooth, urged, against the advice of his department, that drug penalties should be increased because 'marijuana lead[s] to moral degradation, especially in Teenagers'. Four years later at a similar conference,

the Western Australian Minister for Health argued that 'drugs is just the tip of the iceberg. Under it is promiscuous sex and permissiveness throughout the whole pattern of behaviour'.[19] Marijuana was a convenient scapegoat for youthful libertarianism, non-conformity and anti-materialism—a 'whole pattern of behaviour' that the establishment feared. It was indeed a 'sixties drug': what many people hated was not the drug, but the sixties.

Marijuana was not alone in generating these fears; LSD was another example. Lysergic acid diethylamide is a psychotropic or mood-altering chemical used for some psychiatric purposes because of its hallucinogenic effects. It was developed in the 1940s and began to appear in Australia at about the same time that £, s., and d. disappeared. It was seen as a young person's drug, taken for no other reason than 'fun and excitement'. The Beatles wrote a song about it; *Honi Soit*, the University of Sydney's magazine, published a recipe for its manufacture. Parliamentary debate likewise focused on its use by 'numerous youngsters' and 'university students—these wayward intellectuals feeling their way and wanting to be way out'.[20]

The CND's Committee on Drugs Not Yet Under International Control warned about the 'grave dangers of abuse' of LSD in 1966. Government reaction was immediate: the Commonwealth that year imposed strict controls on the importation of LSD and New South Wales classified it as a drug of addiction. In 1967 the New South Wales Poisons Regulations established a separate offence prohibiting the sale, supply, use, or possession of 'hallucinogenic substances', including LSD, except on the written authority of the Director of State Psychiatric Services, and Victoria made it an offence to prepare, manufacture, sell, deal or traffic, or possess a 'hallucinogenic drug' without authority. Detailed restrictions and conditions were also attached to its medical use. The creation of complex detailed legislative and regulatory control over LSD had taken only one year, and by 1969 every Australian jurisdiction had enacted similar controls and offences.[21]

I do not mean to suggest that LSD is a harmless drug: far from it. The reason that governments around Australia reacted so speedily to suppress its use, however, was not because of the harm it was causing, but because of the influential pressure exerted by the CND, and because of the people with whom it was associated and the connotations of vice that it suggested. As S.D. Tooth, the Queensland Health Minister, explained in 1969, the government had not acted to increase controls over barbiturates simply because 'barbiturates are not a problem to any great extent with teenagers'. It was abused by 'older people' and that made it different. LSD use may have been dangerous in itself, but more to the point it was a symbol of youth and rebellion which confronted medical and legal power.[22]

This was the new climate affecting the formulation of drug policy in Australia. The smell of fear was once again on the breeze, the demand for action was intense and reflexes were accordingly sharpened. Amphetamines, classified as 'restricted drugs' (schedule 4) under State law and according to the uniform poisons schedules of the NH&MRC, were also declared to be 'dangerous drugs' around Australia between 1967 and 1971.[23] Drugs were

now becoming a politically prominent issue, and for the first time politicians were prepared to pursue Australian drug policy with energy.

The politicisation of the issue generated not just political interest, but rivalry and acrimony. In the competition for votes and power, drugs, like so many other things, started to become a party-political issue. Although both major political groups sensed that there was political capital to be made out of taking a law-enforcement line on drug issues, the conservative parties in particular tried to brand the Labor Party as opposed to strict legislative control. 'The pressure for legalization,' complained Country Party MHR, Bob Katter, 'came mainly from people with leftist leanings ... People who were outspoken on the Vietnam war and social issues also were outspoken on marijuana'.[24] The demise of the consensual approach to drug law that had characterised the pre-political era was to become even more prominent in years to come; but rivalry did not just occur between political parties. Competition between the levels of government soon emerged as an important factor in the new politics.

The Commonwealth had always hidden behind the supposed limits of its constitutional authority. In *R. v. Burgess*, the High Court held that the 'external affairs' power, section 51(xxix) of the Constitution, entitled the Commonwealth to enact as law the terms of those treaties entered into by Australia that were 'indisputably international in character', specifically including those relating to drug trafficking.[25] This decision was ignored. Thus, following the prohibition of the importation of heroin in 1954, the Commonwealth sought parallel State action to ban its manufacture because, according to Menzies, this matter was outside the Commonwealth's competence. Although the continual pressure applied to the States on matters ranging from jurisdictional uniformity to compliance with Australia's treaty obligations was a thankless task, the Commonwealth undoubtedly believed that any broader legislative involvement was more trouble than it was worth. Politically, too, drug policy, although increasingly significant, was not yet important enough to risk an altercation with the States over constitutional powers. Indeed, it is unlikely that anyone even thought to question the received wisdom that Commonwealth power on this issue was limited to the institution of import controls.

The ratification of the *Single Convention* and the growing political profile of drugs awakened Commonwealth ambition. In 1966, after a draft Act had already been prepared and agreed to by the Commonwealth government, State Premiers were informed that 'it is considered essential that the Commonwealth extend its legislation to cover control over all aspects of manufacture'. Angry at the Commonwealth's refusal even to consult with the States before embarking on this course of action, the Victorian Premier, Henry Bolte, complained to the Prime Minister, Harold Holt, that 'State powers cover the control of manufacture and distribution of narcotic drugs'. Bolte refused to send anyone from Victoria to a Commonwealth–State Conference on Narcotic Drugs Control organised by the Commonwealth that year as a protest against what was seen as Commonwealth intrusion, but

to no avail. Suddenly, the Constitution was not an impediment to legislative action. The Customs representative, relying on section 51(xxix), said that the Premiers should be grateful that the Commonwealth was limiting itself to manufacture; it could 'if it so desired enact legislation in respect of all aspects of the convention'.[26]

According to its preamble, the purpose of the *Narcotic Drugs Act 1967* (Cwlth) was 'to regulate the Manufacture of ... Narcotic Drugs in accordance with the Single Convention on Narcotic Drugs, 1961', and the Convention itself was included in a schedule. In these ways, the Act was carefully designed to draw attention to the Commonwealth's external affairs power. The effect of the Act was to institute Commonwealth control over the manufacture of 'narcotic drugs'. Manufacturers now required a licence from the Minister and a permit from the Comptroller-General of Customs, as well as having to comply with State law on the subject. More than the terms of the Act, however, the mere involvement of the Commonwealth was significant. This was the first piece of Commonwealth legislation dealing with 'drugs' since the passage of the *Customs Act 1901* (Cwlth), and it had been enacted with a cavalier disregard for the sensibilities of the States. In fact, the actual terms of the Act were not communicated to State governments until one month after the Bill had been passed into law. In December 1967 Bolte wrote to the Prime Minister protesting that the *Narcotic Drugs Act* had been rushed through without consultation, and dealt with an area of traditional State responsibility. It was too late for such complaints. Drugs were front-page news and everyone, including the Commonwealth, was determined to be involved.[27]

Bureaucratic Conflict and Invasion 1966–1969

If the encroachment of Commonwealth legislative control alarmed State governments, the growing intrusion of the Commonwealth bureaucracy, and in particular the Department of Customs and Excise, filled State bureaucrats with horror. When drug control was an uncontroversial issue, co-operation between State and Commonwealth bureaucracies was routine. Now that it was a vital issue, rivalry between the various bureaucracies struggling for power over drug control administration and enforcement intensified. Relations between State and Commonwealth police forces and drug squads, between the Customs Department and the various State health departments, and even between the Customs Department and the Commonwealth Department of Health would never again be as easy as in the past. Too much was now at stake.

The 1966 inter-departmental Commonwealth–State Conference on Narcotic Drugs Control, chaired by the Department of Customs and Excise, resolved that 'a central Commonwealth authority' might usefully undertake a co-ordinating role 'down to supply by wholesalers'. But the department, eager to increase its own influence, misrepresented the resolution when it

circulated its summary of the conference proceedings to the States. It reported that it had been agreed 'that the Department of Customs and Excise assume control over the dissemination of information on all inter-state transactions on narcotic drugs'. The actual resolution was neither so specific nor so far-reaching. This manipulation intensified the suspicion with which the Commonwealth and, in particular, the Department of Customs were already viewed by several States as a result of the events surrounding the enactment of the *Narcotic Drugs Act*. Victoria, which had boycotted the conference, resolved to attend future meetings of the Commonwealth–State Standing Committee on Control of Drugs of Dependence (put in place by the conference) simply to protect the Victorian bureaucracy against federal encroachment.[28]

The first meeting of the Standing Committee in December 1966 was chaired by the Department of Customs while each State sent representatives from their health departments, in every jurisdiction the relevant administrative body. As a result, two parallel conflicts emerged: State health departments distrusted the Commonwealth Department of Customs first because it was a federal body, and second because of its unrepentantly law enforcement and punishment-oriented perspective. Fearful of institutionalising a Commonwealth power base 'under a substantially non-medical administration', the department's attempts to have the Committee permanently constituted failed, and it remained only an *ad hoc* body.[29]

The question of ongoing administrative consultation was revived in 1968. In a careful attempt to ease tensions, the Prime Minister, John Gorton, wrote to State Premiers that he was 'aware that some State governments have had misgivings about the Commonwealth's role in the general field of drug control'. He reassured them that there was no intention 'to interfere in traditional areas of State responsibilities'. The States, and the Victorian government in particular, were still distrustful. A departmental briefing paper prepared for Victorian Health Minister, V.O. Dickie, suggested that the Department of Customs wanted to be as powerful as the United States FBN. Inter-governmental co-operation, the Minister was urged, 'should not be dictated by a Commonwealth Department which is not directly concerned with health':

> *There has been a definite attempt by officers of the Department of Customs and Excise to recite themselves into power in a field with a large medical and scientific content.*[30]

None the less the first Commonwealth–State Ministers' Meeting on Drugs of Dependence was held in February 1969, and this in turn established the National Standing Control Committee on Drugs of Dependence (NSCCDD) to advise it. It was chaired by the Comptroller-General of Customs.

The continuing distrust of the Department of Customs and Excise was papered over. At a departmental meeting which was to report back to the Ministers' Meeting that year, the Comptroller-General of Customs proposed

an exchange of officers between the Customs Department and State police forces. Such an exchange would in particular have facilitated the development of the inexperienced enforcement officers of the Department of Customs and Excise in their efforts to become Australia's principal drug-enforcement agency. But the mood of the meeting was hostile. According to the verbatim transcripts, only Victoria supported the proposal:

The Chairman [the Comptroller-General] said that he was amazed at the negative reaction to the proposal... In the circumstances, it seemed that he would be forced to report to Ministers that the Committee did not agree that any improvement was necessary.[31]

As it had done before, however, the Customs Department managed to sanitise its defeat. The summary of the meeting, which the department itself prepared, instead reported that 'with the exception of New South Wales and Queensland', the States had agreed to the proposal, although because the drug problem in Western Australia, South Australia and Tasmania was not very great, 'it is not necessary to implement such arrangements [in those States] at the present time'. By the time this summary had been considered at the next Ministers' Meeting, the truth had been distorted even further. Senator Scott, reporting the matter to parliament, said 'Ministers agreed in principle to exchange officers between the Customs Narcotic Bureau and the Police Drug Squads in each State. Such an exchange is already operating in Victoria'.[32]

The Changing Balance of Power

By the use of such stratagems, opposition to the institutionalisation of consultative bodies under Commonwealth supervision was deflected, and the Ministers' Meeting and NSCCDD became both the primary channel of inter-governmental communication, and an important vehicle for the formulation of uniform drug policies. Sir William Refshauge, Commonwealth Director-General of Health from 1960 to 1973, rarely went to meetings of the NSCCDD because 'it was of no interest to me ... Customs had the running. The Department of Customs and Excise had increasing power and authority over the whole area of drug laws; Sir William, to his later regret, feeling he could not fight it, preferred to ignore it.[33]

Other events were also enhancing both Customs' power and the narrowness of its perspective. The department's role as Australia's conduit to the international community on drug issues had ensured that the approaches espoused by the international community and the FBN were forcefully inculcated within the department. The lack of medical expertise within the Department of Customs and Excise, and the hostility between the it and the Department of Health, meant that any alternative to its law enforcement priorities was treated with suspicion. This perspective was further entrenched in 1970 when the narcotics operations of the department were hived off to a

subordinate, independent body. This was Australia's own Federal Narcotics Bureau (FNB) which, like its United States counterpart, became solely responsible for the enforcement of Commonwealth drug laws and acted independently of both federal and State police. Far from being limited to controlling the importation of illegal substances, as its origins in the Customs Department might have suggested, the FNB was effectively a police force dealing with drug trafficking and smuggling. Like Anslinger's FBN, the Australian FNB, which grew from forty-three officers under its Director, Harvey Bates, to 233 officers under Commissioner Bates in 1979, had a vested interest in advocating those legal solutions which insisted that drug problems were problems of law enforcement. There was no place in a high-status quasi-police force for approaches which called for sympathy for criminals or cast doubt on the effectiveness of the criminal law.

At the same time, State health authorities were invited to take over responsibilities relating to the control of the legal narcotics trade. At first, these changes were only minor, but in 1974 Commonwealth control over the *legal* import and export of schedule 4 and 8 drugs (for medical purposes) was transferred from the Department of Customs and Excise to the Department of Health, and two years later the departmental power to grant and revoke manufacturing licences was also transferred. In this way, the legitimacy of Customs' power over the *illegal* narcotic trade was validated by its divestiture of what it distinguished as 'health matters'. By implication, illegal drug use had nothing to do with health. As Senator Scott, Commonwealth Minister for Customs and Excise, made clear as early as 1969, 'We are looking at illicit traffic in drugs and the health authorities are more concerned with licit traffic.'[34] The two perspectives which had, in the past, coalesced—illness and vice, public health and law enforcement—moved further and further apart.

As the balance of power changed, the Commonwealth Department of Health came to be seen by many politicians as a voice of dissent and a nuisance whose views were not to be trusted. In 1976, defending the Eastland committee report of the United States Congress, which strongly supported the United States's hard-line approach to cannabis, New South Wales MLA, Arthur Viney, had this to say:

The Health Commission of New South Wales had the audacity to produce as a critique ... the comments of a layman named Brecher, a propotist in the Consumers Union. Subsequently I ascertained through questions I asked that Mr Brecher's evidence had been brought forward by the Australian Department of Health. I have no faith in the competence of many advisers to the Crown in the Australian Department of Health.[35]

The atmosphere of animosity and resentment between the departments of Customs and Health was difficult to shake, but its origins did not so much lie in differences about the content of drug laws, but in who was to administer

them. This was, in part, a consequence of the politicisation of drugs, for as drugs entered the realm of party politics, drug policy and drug law became more subservient to political influences than it had ever been. Political power was waxing, and waxing most emotional. The days in which drug policy decisions were made almost solely by the public service were over. Only administrative power remained, but the competition over who was to control it grew all the more fierce. Bureaucratic ambition stirred and bureaucratic rivalry developed as, for the first time, drugs became an important way to garner power and prestige.

The growing emphasis within the public service on administrative power had another subtle implication. Whereas the development of drug laws in the early years of the century reflected growing medical power, now doctors themselves found their freedom circumscribed by bureaucratic constraints. The legal medical maintenance of addicts was wiped out. Heroin and cannabis could not be prescribed at all, LSD and the amphetamines only with specific authorisation and in limited circumstances. A new phase was being entered. The use of 'dangerous drugs' was no longer just a medical matter. It had been appropriated by bureaucracies, systematised and institutionalised in response to their own complex latticework of ambitions and rivalries.

The delicate balance between illegal drug use as an illness and a vice was also changing in the same ways. Not only medical authority, but also the medical conceptualisation of addiction as a disease requiring treatment, were becoming less important than the character of drug use as a crime requiring punishment. The rhetoric about 'sick addicts' continued, but in reality, medicine was yielding its place to law, a change which the increasing suzerainty of Customs over Health served to accelerate.

While obsessed with administrative issues, neither federal nor State bureaucracies had any reason to question the general approach of drug legislation—not simply because it suited their own ambitions, but also because one of the central functions of any bureaucracy is to administer the status quo effectively. A great deal of energy within a department is focused on how to improve the operation of the entrenched legal structure and not to question whether it should exist at all. As Sir William Refshauge commented:

That's why I left the Department. I was beginning to see that happening in me. People would come to me with new ideas and I could see that I was not listening. I was losing my flexibility.[36]

More laws were developed, but they were more of the same. As with politicians, the habits of mind with which bureaucrats responded to the changing face of drug use remained rooted in the past. Australia in 1970 was a very different place from what it had been ten years earlier. Politicians and bureaucracies knew this to be so, but their knowledge had not led them to alter the direction of drug policy in Australia. It had merely increased their desire to be in charge of it.

8

SHADOWS OF THE PAST

The Triumph of Meta-Law
1970–1980

Meta-Law in Australian Drug Reforms 1970–1972

The *Convention on Psychotropic Substances 1971*, and the *Protocol Amending the Single Convention* signed the following year, the latest products of the international Convention factory, were a strange mixture. They acknowledged for the first time that the international drug control regime was not as successful as had been hoped. Both treaties referred expressly to the importance of the 'treatment, education, after-care, rehabilitation and social reintegration' of drug users, a jarring note of compassion. As the *Commentary* on the Protocol published by the United Nations explained, this reflected 'general acceptance of the view' that the Conventional system and its enforcement 'is not sufficient, and should not form the sole object of international co-operation'.[1]

The substantive terms of these treaties, however, were still dominated by the inflexible legal strategies characteristic of the Conventions since 1909. The 1971 Convention, sponsored by the International Narcotics Control Board (INCB), expanded the system of 'narcotic drug' control to include 'psychotropic substances' such as LSD, mescaline and psilocine, as well as requiring similar controls over amphetamines and barbituric acids. Detailed requirements were provided for the import and export, manufacture, prescription and keeping of records of all substances dealt with by the Convention. In addition, the INCB was given considerable powers to pressure parties which in its opinion were in breach of the Convention. It could 'ask for explanations from the Government', call upon it to take remedial measures, call the matter to the attention of other parties, publish a report dealing with it and, finally, 'recommend to [other] Parties that they stop the export, import, or both, of particular psychotropic substances from or to the country ... concerned'.[2]

The 1972 Protocol that amended the *Single Convention* further increased the authority of the INCB as the supreme international drug control bureaucracy. The Board was given the power 'to establish, communicate and publish its own estimates' if it believed the statistics supplied by a party were misleading. In addition, if the Board believed that a signatory's opium production was being substantially diverted to the illicit traffic, the Board was empowered to unilaterally reduce that country's estimates for the following year. Since other parties to the Convention were bound to comply with these estimates, the INCB was therefore given the power to control the flow of drugs into any country that, in its opinion, was failing to exercise satisfactory supervision over the production of opium.[3] The role of the INCB was expanded in other ways. It was enabled, on its own initiative, to call for consultation on a 'serious situation' or drug problem in a country, propose a study, suggest remedial measures, and recommend the provision of technical and financial assistance. The INCB was still largely dependent on international co-operation, but it was maturing into an influential body with wide-

ranging responsibilities and interests.[4]

While Australia's loyalty to the continuing internationalisation of drugs was unfaltering, the prompt ratification of these treaties had few domestic consequences. The Protocol did not require any enacting legislation as it dealt only with the international bureaucracy itself. The *Convention on Psychotropic Substances*, in contrast, dealt largely with matters traditionally within the jurisdiction of the States. When the Commonwealth finally enacted the *Psychotropic Substances Act 1976* (Cwlth), it respected this traditional division and did not provoke a battle as it had done in 1967. It was, in fact, the Commonwealth's refusal to invoke the external affairs power to 'enter the whole field' that provoked criticism from the opposition Labor Party.[5]

The reason that ratification was relatively unimportant was simply that Australian governments no longer had to be cajoled and pressured into legislative amendments; they had learnt their lessons well and were frequently in advance of the international community. In the case of amphetamines and barbiturates, for example, controls had been instituted well before the signing of the Convention. The Prime Minister, William McMahon, noted that 'existing Australian controls, both Commonwealth and State, are in many respects stricter than those envisaged under the Convention'.[6] The overwhelming power the drug control club had exercised in the formative years of Australian policy continued to guide and to haunt us.

On the domestic scene the illegal use of drugs, especially of heroin and cannabis, continued to increase steadily. In the face of this problem, the principles behind the legal structure remained untouched and unquestioned, while laws designed merely to better enforce that structure proliferated. Were drug laws failing to hold back the rising tide of illegal drug use? The answer was to make conviction easier and so to convict more people. Were the penalties imposed by the courts not serving to discourage illegal drug trafficking? The answer was to introduce higher penalties.

The incremental and circular nature of Australian drug policy, which was originally expressed by expanding the range of drugs to which the policy applied, was now expressed by expanding the controls which applied to those drugs. This phenomenon I call 'meta-law': that is, laws about laws, not laws about things. A meta-law does not alter what people can or cannot do: rather it aims at enforcing laws already in place. Laws which expand police powers simply make enforcement easier. Laws which make less onerous the proof needed to convict someone of a crime likewise do not change the fact that X is legal and Y is not: but the circumstances in which the courts will declare that a particular action falls into category Y and should therefore be punished, are expanded. Again, by increasing the penalty attached to a crime, governments hope to change behaviour not directly, but by the threat of greater punishment. These are examples of meta-law. They do not tell people what to do, but they do tell people not to break the law: you will be caught more often, convicted more easily, and punished more severely.

Thus, police powers of search and seizure gradually increased, specifically

in relation to 'drug offences'. In South Australia the right to search premises or vessels and to stop, search and detain vehicles or persons without a warrant was granted to authorised police in 1970, and to all police in Queensland in 1971. In Victoria, the power to search without a warrant public places, vehicles and boats for the presence of poisons or deleterious substances, originally granted to 'authorised' police officers in 1967, was gradually expanded over the next four years until it applied to all police.[7]

By the very process of abstraction inherent in meta-legal solutions, underlying legal principles are concealed. What do you do if a building is unstable—do you study its foundations, or do you merely reinforce the scaffolding? The explosion of meta-laws in the last twenty years has been like so many flying buttresses, put in place first to steady the superstructure, and then to try and shore up the buttresses themselves. The outline of the edifice itself is almost invisible in the complex of struts which prop it up.

Don Chipp, crusading Minister for Customs and Excise from 1970 until 1972, was an influential exponent of meta-law. He was a young and aggressive Minister, a staunch advocate of increased resources and legislative powers for his department, a vigorous opponent of marijuana law reform and a voluble critic of judicial leniency in the infliction of penalties, which he incessantly proclaimed to be 'completely beyond [his] comprehension'. The distinction between the 'pusher' and the 'addict' was central to his rationale for increased law enforcement measures. 'People who are addicts are to be pitied,' he explained, 'and they should be treated.' 'The drug pusher who is not a user,' he said on the other hand, 'is an evil person who deserves no mercy.'[8]

The *Poisons (Amendment) Act 1970* (NSW), introduced by the Askin-led Liberal government, demonstrated the growing importance of the trafficker as the emotive target of meta-legal solutions. A.H. Jago, the New South Wales Minister for Health, introducing the Bill, explained that

> *lying at the core of the drug abuse problem is the pedlar. The pedlar is insidious and unscrupulous; without him there is no organised drug abuse problem.*[9]

This was nonsense, both because most 'pedlars' are also users and because it assumes that there is no natural demand for the use of, for example, cannabis or heroin. But the image of the drug user as ill and not vicious had always threatened to undermine the punishment-oriented approach of governments. By distinguishing between user and trafficker this difficulty was avoided. Law enforcement measures could expand without criticism, focused in theory, if not in practice, upon evil drug traffickers. Once again, someone could be *blamed* for the continuing illegal use of drugs. The day of the evil drug fiend was over; that of the evil businessman was about to dawn.

The *Poisons (Amendment) Act 1970* (NSW) made it a separate offence to sell or deal in any 'drug of addiction', bringing New South Wales into line with other States. Now in every State drug trafficking constituted a separate

offence. As recommended by the NSCCDD, an increased penalty of up to ten years' imprisonment was enacted for persons found guilty of the supply or sale of drugs. 'We need hard lines and not guide lines' the Commonwealth–State Ministers' Meeting held in April that year had declared. More importantly, any person found in possession of an amount in excess of what was termed a 'prescribed quantity' (for example, over twenty-five grams of cannabis or 0.5 grams of heroin) was 'deemed to have that drug or substance in his possession for supply or sale'. They then became subject to the higher penalty unless they could prove they were not traffickers. In South Australia, Queensland, and the Commonwealth, where similar laws were passed the following year, this amount was called a 'traffickable quantity'. The onus of proof was reversed and accused persons were required to prove their innocence.[10]

The *Customs Amendment Act No. 2 1971* (Cwlth) took a similar approach. Previously it had been an offence to be in possession of an illegal import. Now it became an offence to possess any narcotic 'reasonably suspected' of having been illegally imported. Even persons not involved in the act of importation were now guilty of a breach of Commonwealth law. Moreover, since the importation of heroin or cannabis was absolutely prohibited, any person found in possession of these substances would automatically fall foul of this provision—while actual proof of the act of illegal importation may not be available, it was *always* 'reasonable' to 'suspect' that they had been imported illegally. In effect although not in form it became a crime under Commonwealth law as well as under State legislation to possess schedule 8 drugs. The practice adopted by the Department of C'ustoms of referring cases to State police 'where direct evidence of importation was not available' was discontinued.[11]

As well as extending the authority of the department far beyond the customs barrier from which its constitutional authority derived, the Act was another meta-legal reform. Persons charged with possession were presumed guilty unless they could prove that the drugs they possessed had not been illegally imported. The prosecution did not have to show that the accused knew that the drugs in question had been illegally imported; the accused had to prove that they did not.[12] Rather than change the substantive law, this reversal of the traditional onus of proof, as in New South Wales, merely made it easier to obtain a conviction. Drug law, and in particular trafficking, was becoming a special case in which the normal principles of proof and normal levels of punishment did not apply.

The *Customs Amendment Act No. 2 1971* (Cwlth) was not supported whole-heartedly. Bill Hayden, a future leader of the Labor Party and, eventually, Governor-General of Australia, contended that 'criminalising has failed' and wondered if the control of drugs was 'a proper subject for police and prisons or is it a proper subject for medical authorities'.[13] More importantly, the Act ran counter to the tenor of the Senate Select Committee on Drug Trafficking and Drug Abuse that reported that year. Dominated by members of the Liberal Party, which was in government, the Committee

had been instructed to report 'upon drug trafficking and drug abuse in Australia'. Such a broad topic, however, allowed it to deal not only with schedule 8 substances, but with 'all drugs capable of producing dependence', legal or illegal. Somewhat uncomfortably for the government, the Committee rejected the notion that illegal drug use was uniquely harmful or sinful, and it concluded that it was inappropriate to increase the penalties for illegal drug use.[14]

The creation of a parliamentary inquiry reflected growing community concern over 'the drug problem' which was in part generated by the politicisation of the drug issue itself. But politicians were not prepared to countenance opinions contrary to the received wisdom. Despite the Committee's recommendations, the *Customs Amendment Act (No. 2) 1971* (Cwlth) expanded both drug offences and penalties. Senator Turnbull, a member of the Committee, asked eighteen months later 'whether the Government has any intention of implementing anything' in the report. 'Even with a majority of Liberals on the Committee, no weight at all has been given to its report.'[15]

In general, the Act generated fervid support that brooked no opposition. Clearly, Don Chipp, the Minister responsible for the Act, was aware of its weaknesses. In late 1972, after visiting the United States and Europe, he concluded that 'the policing or law enforcement technique as practised in the United States particularly had failed'.[16] Yet as Minister for Customs and Excise he intensely pursued law enforcement strategies. His emotional reaction to the 'evil drug pusher' never allowed his critical faculties full rein. Instead, during his tenure, the interrelated trends that characterised legislative developments in the 1970s—towards meta-legal solutions and towards fierce condemnation of the trafficker—were given powerful and passionate impetus.

The Politics of Cannabis 1970–1976

Why was this law enforcement approach clung to with such tenacity even by those who knew its limitations? Three points related to the politicisation of drugs need to be made. First, illegal drug use in Australia created an emotionally-charged environment. Meta-law comforted a nervous public with the implicit assurance that those who broke the law were bad and worthy of punishment, and that 'the drug problem' *could* be beaten if only it was backed by enough resources and appropriately severe legislation. These attitudes, furthermore, resonated with the themes of drug policy followed in Australia for many years: of the incremental growth of legal controls; of demonology and scapegoating; of faith in the validity and efficacy of the law. Meta-law was easy and it was familiar.

Second, taking a tough line was politically advantageous. It was hard for politicians to ignore the popularity they gained by rhetorical support of meta-law and by noisy tirades against traffickers. But while this emotional

pitch responded to public fears, it also perpetuated and intensified them. To be 'soft on drugs' came to look more and more like political suicide.

Third, the public and political attitude to drugs was not, as we have already seen, about public health at all. Here, then, we acknowledge why 'drugs' were such an emotional issue to begin with. In debate on the Poisons (Amendment Bill) 1970 (NSW), a government member made the approach of conservative politicians clear:

Permissiveness as a whole has many parts, including permitting homosexuality ... permitting sexual intercourse outside previously tolerated bounds; permitting easier divorce ... permitting attempted suicide; permitting euthanasia; and permitting soft, tolerant attitudes to the rearing and education of children and to discipline and authority generally.

One conservative speaker bemoaned the attendance of a member of the opposition at an anti-Vietnam War moratorium rally; another thought drugs were part of a communist conspiracy; the next complained that Mick Jagger and Marianne Faithfull were living together unmarried; and the next spoke about the dangers of pop festivals.[17] These apparently extraneous matters lay at the very heart of the opposition of these speakers to drug use.

In arguments about the dangers of marijuana, reference to the so-called 'amotivational syndrome' was common. According to this argument, marijuana use created laziness and disinterest. In this way, the rejection of materialism and alienation associated with young marijuana smokers was given a scientific aetiology—even though many young people who had never smoked marijuana had also rejected these values. The bottom line was, dope smokers are lazy. But by shrouding value judgements about the political and moral importance of work in pseudo-science, the actual underlying fears were both obscured and validated. As sociologist Joseph Himmelstein wrote, 'The amotivational syndrome ... was simply the counterculture writ small and turned into a psychiatric diagnosis.'[18]

The work of drug 'expert', Professor Hardin Jones, provided some of the most extreme examples of this technique. He was quoted at length in debate on the Poisons (Further Amendment) Bill 1977 (NSW):

The conditioned social responses, such as affection for parents and tolerance for their suggestions, are impaired ... The marijuana user does not want to be 'hassled'. Mild criticism or merely requesting that housekeeping chores be done may be interpreted as hassling ... The hypnotic effects of marijuana are, in my opinion, largely responsible for ... a yielding to homosexual advances, and overly generous compliance with unreasonable requests by friends ... The diurnal cycle of sleep and waking is largely inverted. The marijuana user stays up at night.[19]

What were his real objections? That 'drug users' were rebellious, that they did not listen to their parents, that they didn't do the dishes, that they spent too much time with their friends, that they stayed up late. These are familiar criticisms of the young, here *explained away* as symptoms of an illness. The rebellious behaviour itself was blamed on 'drugs' and discredited as sick, while the writer's own moral and political values were securely placed on a scientific pedestal.

Opposition to drug use reflected genuinely held political beliefs about a whole range of other social values and not just about the use of 'illegal drugs'. It is no wonder that a parliamentary inquiry, no matter how rational, failed to change anyone's mind. An inquiry about 'drugs' could not address the real and underlying fears which drug use aroused, or the political values it was seen to challenge.

Given these political implications, the Labor Party was particularly vulnerable to attack. Its 'softness' on drugs was seen as symptomatic of a general sympathy for social non-conformity, change and rebellion. As never before, drug policy became party-political. This was especially true in relation to marijuana. First, it was the drug of choice of the young; both the total number of users and its use proportionate to other drugs was dramatically on the rise in the early 1970s. In New South Wales, for example, fifty-seven cannabis users were convicted in 1966, and 365 in 1970 (forty per cent of total drug-related convictions). By 1977 the number had shot up to 4300 and (seventy-two per cent of convictions).[20] At the same time, sellers and users were discovering that cannabis is an easy plant to grow in Australia. Many users grew a couple of plants in their back gardens or in their roofs; some grew enough to sell to their friends and acquaintances; others began to take it on as a commercial venture. Especially in New South Wales, larger and larger crops were grown for distribution all over the country, carefully concealed from the prying eyes of the police. Marijuana was no longer commonly imported into Australia, although more concentrated versions of the drug were. It was cultivated on Australian soil, on a rapidly expanding scale and with increasing sophistication.

Second, doubts as to how dangerous cannabis really was made it the weak link in the drug control regime. As penalties relating to its possession and trafficking increased, so too did the chorus of criticism. Some argued that it was no more dangerous than tobacco and alcohol, and should be legalised. Still more spoke of 'decriminalisation', a word long enough to conceal a multitude of opinions: most commonly, it meant that users should be required to pay only a small fine—without the risk of a term of imprisonment—and that, if the penalty was paid, no criminal record should stigmatise the offender. Many others, who were not prepared to go so far, did not believe that the mere possession of marijuana deserved penalties as severe as those which attached to other schedule 8 drugs. They at least rejected the *Single Convention*'s assertion that heroin and cannabis were equally and especially dangerous,[21] and insisted that the punishment of offenders should reflect those distinctions. The drug control system, then, provoked controversy and

opposition on the question of marijuana as in relation to nothing else.

Third, the Labor Party was more vulnerable to conservative attack on the question of marijuana law reform than on any other drug issue. In debates in the Commonwealth parliament from 1970 to 1972, Labor politicians, Dr Klugman, Dr Cass, Senator Cavanagh, Dr Everingham and Senator Wheeldon, all made their opinions on the need for legislative change clearly known.[22] All of them, then, were on the record as being 'soft on drugs'.

In this highly politicised climate, everything about the drug provoked controversy—even how it should be defined. In New South Wales, Victoria and South Australia, for example, Indian hemp was defined as 'the fresh or dried aerial parts of the plant known as Cannabis Sativa L'. The Chief Botanist of the Royal Botanic Gardens, Kew, however, advised that the genus 'cannabis' may include a number of slightly different species, of which 'sativa' is only one. In New South Wales in 1970, and in South Australia and Victoria later, the definition was revised to include 'any plant or part of a plant of the genus cannabis'.[23] The Commonwealth *Customs Amendment Act No. 2 1971*, on the other hand, defined 'cannabis plant' as 'a plant of the genus *Cannabis sativa*'. This was botanical nonsense. Although the definition claimed to be describing a genus, the words '*Cannabis sativa*' describe a species. The words 'genus' and 'sativa' cannot both be given effect to. While the High Court of Australia managed, unconvincingly, to avoid the problem when the section came up for interpretation in the case of *Yager v. Queen*, its decision was important mainly for the parliamentary ignorance it demonstrated.[24] Politicians' keenness to legislate against marijuana was not accompanied by even the most rudimentary knowledge.

The law in force in the Australian Capital Territory did not include a definition of cannabis.[25] After costs were awarded against the police in several cases, it was decided not to continue to prosecute users for mere possession until new legislation was passed. From 1973 until mid-1975, only one case of possession was prosecuted and the position in the Australian Capital Territory at that stage was therefore, in practice, one of decriminalisation. Matters then came to a head. The Australian Capital Territory at that time had no local government. It was administered federally by a Labor government, which, led by Gough Whitlam, had swept to power in December 1972 after twenty-three years in opposition. But the conservative forces showed no taste for opposition. By 1975 the government was being subjected to an intense campaign of destabilisation and was proving disorganised in response. This campaign centred on fear: fear of radical change, fear that the Labor Party was undermining the rule of law, fear of socialism and centralism.

Cannabis in Canberra was grist to the Liberal Party's mill. It aroused the fear of change that already characterised community concern about the drug; it represented centrist 'Canberra' going behind the backs of the States; and it hinted at a conspiracy to subvert the rule of law. Don Chipp accused Whitlam's government of acting with 'blackguardly impertinence' to effect legislative change in an 'underhanded and cavalier manner'. The image of

deception which the government projected was hardly helped by the reply of the Attorney-General, Kep Enderby, who complained that the policy in the Australian Capital Territory 'would have gone unnoticed were it not for politicians like Mr Chipp trying ... to get their name in the papers'.[26]

Enderby's insouciance seemed only to confirm Chipp's charge, and a statement he made at the same time, which suggested that he wanted to introduce overriding Commonwealth legislation imposing uniform penalties for drug offences, including a significantly lesser penalty for cannabis use, caused a furore. 'Soft drug users will be fined an almost nominal $100' reported the *Australian* in an article headlined 'Govt will over-rule States on drug law'; the proposal was 'attacked as unconstitutional by three premiers' who vowed to 'fight [the] new drug laws in High Court'.[27] Hostility to cannabis use was therefore swept along in 1975 by fierce hostility towards the Whitlam government, coupled with arguments that related more to fears about 'States' rights' than to fear of drugs.

In 1975 a definition of cannabis was at last included in the Australian Capital Territory Ordinance. But at the same time, a new penalty provision was included:

> *the only penalty that may be imposed on a person convicted of an offence ... of having had in his possession a quantity of cannabis of less than 25 grams, is a fine not exceeding $100.*[28]

While this did not constitute decriminalisation—offenders still had a criminal record—it was a significant amendment. For the first time in Australian history, the penalty for a drug-related offence had been substantially reduced. As well as reflecting the Labor Party's libertarian approach to individual morality and social conformity, and recognising the vast scale of cannabis use amongst normal young men and women, the law was in fact a function of the meta-legal approach, for as the image of the evil trafficker became more and more important, the crime of possession for personal use was de-emphasised. Mere possession, the punishment of which had been so important in the development of drug policy in Australia, was becoming a side issue.

On its face, however, the Ordinance ran counter to the dominant law enforcement perspective. The conservative parties mobilised, unable to stop the passage of the law in the Australian Capital Territory and fearful of Enderby's threat to introduce similar Commonwealth legislation. In Victoria, for example, the Minister for Health, Alan Scanlan, instructed the Chairman of the Mental Health Authority to prepare a paper 'indicating ... that marijuana impairs judgement [and] that in certain circumstances, marijuana becomes, with some users, a basis of experimentation'. These were forwarded to the Premier, Rupert Hamer, and described by Scanlan as 'reports by my officers setting out their views on the matters we discussed'.[29] Yet the reports were neither unsolicited nor impartial. They were prepared on the instruction of the Minister for the express purpose of reaching specific

conclusions. No longer were the actions of politicians governed by the will of the bureaucracy; bureaucratic advice was now tailored to political order.

To alleviate States' fears, a NSCCDD working party was set up to examine penalties for drug offences. Although established during the tenure of the Whitlam government, it reported to the new Liberal government of Malcolm Fraser after the general election of December 1975. It did not advocate the adoption of the Australian Capital Territory law, but while it proposed a further increase in the maximum penalty for trafficking offences up to $100 000 and twenty-five years' imprisonment, it recommended that the penalty for trafficking in cannabis should not be increased. Malcolm Fraser stated that 'cannabis (at least in leaf form) is not as dangerous as heroin and should neither be placed in the same category as this drug nor attract as severe a penalty'.[30]

The Commonwealth amended the *Customs Act* accordingly. In Victoria, the *Poisons (Drugs of Addiction) Act 1976* introduced into Victorian law the concept of a traffickable quantity, such as that which had operated in New South Wales and the Commonwealth since 1970–71, and also established distinctly different levels of penalties for traffickers in marijuana (up to ten years or $4000 or both) and for any schedule 8 substance (up to fifteen years or $100 000 or both). To the meta-legal tactic of 'a really incredible penalty' for trafficking was added a two-tiered approach to punishment.[31]

Yet the political association between a 'hard line' on drugs and conservative politics made even this distinction—not a reform, but just a recommendation that the penalty not be further increased—contentious. In Queensland, Deputy Premier and Health Minister, Dr Llew Edwards, advised Cabinet to accept the Prime Minister's recommendation about cannabis, noting that 'there is strong evidence that its ill-effects are by no means as severe as that which occurs in the use of other dangerous drugs'. Edwards and the Department of Health, however, were rolled, and the Queensland government decided, instead, to increase maximum penalties for trafficking in *all* 'dangerous drugs' from $10 000 to $100 000 and from 10 years' to life imprisonment. The NSCCDD, the Prime Minister, the Health Minister and his department, were all ignored. The same year, an expert panel appointed by Dr Edwards reported to Cabinet 'that the present evidence gives no reason for believing that marijuana is a serious health hazard'. Cabinet refused to table the paper in parliament or to have it printed.[32]

Cedar Bay

The politicisation of drugs, and especially of marijuana, encouraged the adoption of tough law-enforcement strategies, and made other legal reforms difficult and partial. In Queensland, in particular, the Country Party's (later renamed the National Party) image as being 'tough on drugs' was a crucial element in its electoral support. The conservatism of the electorate as well as

that of the government reinforced these values. In the far north of the State the conflict between the established residential population and the alternative lifestyle movement that was trying to make its home there was especially intense. 'Hippie-life worse than aboriginal. Pot-worshippers in humpies', screamed one headline from the Brisbane *Courier-Mail* in 1971, while in another article it condemned the use of marijuana by 'hippy or drop-out subculture youth'.[33] It was their membership in the subculture, not the fact that they smoked pot, that constituted the real objection.

The Cairns area was subjected to considerable police attention and community unrest in relation to 'hippie movements in North Queensland' in the following years. 'Over twelve hundred people are receiving unemployment benefits and a great number of them are drug users,' complained Anita Campden-Main, chairman of a steering committee that became the Cairns Drug Action Committee. In June 1974, for example, police and customs officials conducted a series of investigations over 300 miles of northern coastline, but only six arrests were made.[34]

On the morning of Sunday, 29 August 1976, the government acted with greater resolution. Twenty-two well-armed Queensland police, assisted by seven Commonwealth customs officers, a patrol boat, a customs launch and an RAAF helicopter, attacked the twenty inhabitants of Cedar Bay, near Cooktown, in the far north of the State. Up to one hundred marijuana plants worth about $20 000 were seized, making it unlikely that any 'trafficking' was going on beyond the people who lived there and their friends, and a number of arrests were made, mostly for vagrancy. According to the police, the primary purpose of the raid was to track down an alleged drug trafficker who had escaped from custody in Cairns and, in addition, to arrest any persons living on the commune found to be cultivating or in possession of cannabis. It was also wrongly alleged that the community was illegally encamped.[35]

Whatever the pretext, the real aim of the operation seems to have been to raze the commune to the ground. Houses were burnt; books, children's clothes and about four months' supply of food were doused in fuel and ruined; and a large amount of personal property was destroyed. Water tanks were filled full of holes and a hose cut to pieces. The main subsistence garden was destroyed and dozens of fruit trees were chopped down. One witness described the scene:

They began by searching us and our property, ripping all our food supplies apart with a knife and pouring shampoo all over them ... They proceeded to pour kerosene over our huts and clothes and set fire to them ... While these were burning they led us to the beach and handcuffed us to the trees.

Another commented that 'they were firing bullets everywhere and reminded me of cowboys ransacking a town'. Queensland Police Minister, Tom Newbery, claimed that 'many residents of the area were armed and fired

shots when they fled into the jungle away from police'. Whether they were in fact armed is not clear; that they chose to run away scarcely comes as a surprise.[36]

Twelve people were charged. Four received terms of imprisonment for drug offences such as possession of marijuana seeds. The rest were charged with vagrancy and, although several of them claimed that their bank-books had been confiscated or torn up by the police in order to ensure that the vagrancy charge would stick, all pleaded guilty, fearful that if they did not bail would be opposed and they would be remanded in custody for another week.[37] Then, on 9 September, the convictions were set aside, not because of the handling of the raid, but because the Justice of the Peace who heard the cases had acted beyond his power. On the raid itself, the Queensland government remained unrepentant. The opposition's criticism of the police confronted those values of authority, conformity and obedience central to the government's philosophy. Senior government Minister, Russ Hinze, complained, 'The police are always in the wrong. You blokes always blame the police'. 'The Government will believe the police,' said the Premier, Joh Bjelke-Petersen.[38]

Illegal drug use was therefore crucial neither to the raid nor to the government's defence of it. It was a search-and-destroy mission directed against a lifestyle in relation to which marijuana use was only a symptom and a symbol. One police officer was reported to have said to one of those arrested that 'he wished I had run away [as] he would have shot me cause of being on dole'. That officer, at least, was not there to arrest drug traffickers, but to punish 'dole bludgers'. So too, Newbery emphasised that the inhabitants of the northern section of Cedar Bay were 'undesirable persons ... living in complete squalor. The stench of human excrement was over-powering'.[39]

Does all this sound familiar? A century earlier the Chinese had been characterised in exactly the same way, for the same purposes, and with a similar lack of proof. Marijuana smoking was associated with the residents of Cedar Bay just as opium smoking had been associated with the Chinese: as a rationalisation for oppression in fact rooted in less concrete fears. More shadows of the past. Still Australians feared and victimised people who were different. Still we used their drug use as an excuse for hating them, and as a means of explaining away their differences. Still we covered our prejudices with myths and demonology. Did White women live with the Chinese? Opium slaves. Did 'hippies' drop out and live on the dole? Prisoners of dope.

A New Political Consensus

Just as the rhetoric and paranoia of war defines pacifists as cowards and radicals as traitors, so the unfolding 'war against drugs' threatened to turn all those who did not support the orthodoxy into fellow-traffickers. In Queensland the Premier's Department prepared a 'special and urgent' briefing paper on 'marijuana, drugs and ALP' in 1979, which explored the polit-

ical advantage that could be gained by the 'exploitation' of 'known sympathy within ALP for drug culture'. 'Is ALP on the take from the marijuana lobby to promote pot and drag its feet on effective policing?' the paper wondered and, later, 'Question: Is [legalisation] just another way of saying government was throwing in its cot [*sic*] with the drug criminals? Had [the Labor Party] been bought by criminal money?'.[40] The political risk of challenging the status quo was evident, the possibility of distortion and sensationalism endless.

Nevertheless, during the 1970s it was the policy of the Labor Party's Queensland branch 'to decriminalise the use and growing of marijuana for personal use'; the health committee of the Labor Party's New South Wales Central Executive recommended that marijuana be treated differently from the opiates; the Victorian Labor Party's spokesperson on health stated that State law enshrined 'a basic misunderstanding about cannabis or marijuana'.[41] This, however, was all in the wide open spaces of opposition. Once in government, the politicisation of drugs placed the Labor Party on the defensive: its failure to prosecute the 'war on drugs' would lose it many votes and gain it few. Political exigencies forced it to conform to meta-legal orthodoxy when in the narrow and cautious corridors of power. Thus, after three years of federal Labor government, the only change that advocates of reform could point to applied in an area of about 1000 square kilometres.

In New South Wales, Neville Wran's Labor government was elected in 1976 and immediately felt under pressure. In response to a memorandum from a bipartisan Joint Committee Upon Drugs which had recommended in March 1977 'that offences for the personal use of cannabis be no longer considered criminal offences', Neville Wran issued a definitive statement in which he claimed that 'certain fears have been deliberately generated amongst the community concerning the Government's intentions about the use of marijuana'. He announced that 'the Government does not intend to legalise the use of marijuana' and placed any 'material step towards dealing with offences involving the personal use of marijuana' in the distant future. Even the position in the Australian Capital Territory was described as an erosion of community standards.[42]

Supporting the status quo was politically safer than reform. The *Poisons (Further Amendment) Act 1977* (NSW) provided for a separate offence of cultivation of a 'prohibited plant' such as the opium poppy or cannabis, and increased all penalties for trafficking—to ten years and $25 000 for 'Indian hemp in leaf form', and to fifteen years and $50 000 otherwise. While this reform clearly distinguished between trafficking in cannabis and other drugs, as recommended by the Prime Minister the year before, the penalty for possession remained the same for both marijuana and other illegal drugs, and the penalty for trafficking in marijuana remained extremely severe. As the Labor Party proudly pointed out, the Victorian Liberal government's *Poisons (Drugs of Addiction) Act 1976* only provided a penalty of 10 years and $4000 for trafficking in marijuana.[43]

Still the opposition accused the government of being 'soft':

The Attorney-General smiled softly upon cannabis, and its user cults, much as if marijuana were a rose or a daffodil. A little more cautious, a little more the each-way bettor, the Premier likewise basically is a soft-liner.

The Labor Party was driven to ever greater heights in its attempts to deny its reputation as a party of reform. Neville Wran described 'drug traffickers and pedlars' as 'parasites' for whom 'no penalty was too great'. The opposition was accused of 'peddling' 'filthy lies' 'for their own selfish, miserable and unchristian political purposes'. Between June and September 1977, Wran's statement on cannabis was quoted verbatim in the parliament no less than four times.[44]

So effective had the conservative parties been in generating a fear of change that the Labor Party in government was forced to argue its policies according to criteria dictated by its opponents. All it could say was that it was a more effective administrator of the entrenched policies of prohibition and penalisation than the other side. The alternative was seen to be too politically risky.

The Age of Royal Commissions 1977–1980

Political speeches and police activity reassured few people. Year after year promises of victory in the 'war against drugs' remained unfulfilled, and its likelihood receded. Both the public and politicians sought answers: what was 'the drug problem'; who used illegal substances and why; should they be stopped and how? Alongside the extremism and enforced conformity that emerged from the years of political conflict, some influential reports dared to voice dissent.

The Senate Standing Committee on Social Welfare chaired by a Liberal Senator, Peter Baume, which began its inquiries in 1974 and tabled its report in 1977, was charged with the investigation of 'drug problems' arising from the use of alcohol, tobacco, analgesics and cannabis. Like the 1971 Senate report, to which to some extent it was a sequel, it was therefore determined to emphasise that the medical harm and legal status of drugs were not related. More than this, however, the Committee explored the myth-bound nature of the public's understanding of the 'drug problem', which it described in a memorable phrase as 'the drug problem problem'. The Committee saw the 'drug problem' as a cause for public concern—but also as a creation of it. Although the report particularly took to task the standard of public debate on drugs in Australia, its proposals for change proved no less discomfiting to the government. Specifically, in a recommendation subject to a strong dissent from two Senators, but nevertheless garnering bipartisan support, the Standing Committee recommended that the personal use of marijuana should 'not be defined in law as a crime ... the penalty [to] be solely pecuniary ... ' with 'no record of conviction ... used in subsequent proceedings'.[45] For the first time, an official report had recommended far-reaching change to the legal status of cannabis in Australia.

The South Australian Royal Commission into the Non-Medical Use of Drugs was a more comprehensive document and an even more thoroughgoing assault on orthodox wisdom. It was appointed in 1976 by Don Dunstan's Labor government, following a recommendation by the Labor Party's State conference that an inquiry be held into 'all aspects of marijuana' and pressure from the Liberal opposition for a more far-reaching inquiry. The leader of the opposition, Dr Tonkin, insisted that 'a full inquiry is urgently needed now—not at some time in the future'. Armed with extremely broad terms of reference, therefore, the three Royal Commissioners, under Professor Ronald Sackville, proceeded to question the whole basis of drug laws in Australia.[46]

Like the Senate reports before it, the methodology of the South Australian Royal Commission owed as much to the disciplines of philosophy and sociology as to law and medicine. The Commissioners were at pains to describe and puncture the elements of mythology and ideology which they saw as interfering with the development of a rational drug policy.[47] Aware of the need above all to dispel public ignorance and prejudice, the Commission instituted an innovative research programme and published several research and discussion papers. At last, in 1979, the Commission submitted its *Final Report*. In language at once elegant and precise, it attempted to reason from first principles the aims of drug policy and the best means of achieving those aims, assuming nothing and unencumbered by the shadows of the past.

Law enforcement strategies were consequently down-played. The 'reverse onus' provisions were criticised and their repeal urged. The enactment of abnormally high penalties was condemned. Even that shibboleth of orthodoxy, the crime of possession itself, was extensively criticised, although the Commission did not finally recommend its abandonment. More significant than its conclusions, however, was the fact that for the first time since its creation, the whole structure of drug control was opened up for debate. Why should someone be punished not because of anything they have done but merely because of what they possess? Does the crime of possession work? Even posing these questions was courageous.[48]

But if courage was a virtue, its conclusions on cannabis qualified it for sainthood. It recommended 'a partial prohibition model' under which 'cultivation for personal use, use in private and small-scale gratuitous distribution in private to adults would not be a criminal offence.'[49] This was not decriminalisation—it was a proposal for legalisation. Even more than the Senate Standing Committee's report, the Royal Commission assaulted orthodox wisdom.

Orthodox wisdom fought back. The report of the Senate Standing Committee was, predictably, shelved by the government. Debate was still proceeding in a dilatory fashion three years after it had been tabled, but, although ostensibly about the report, these debates made little mention of it at all.[50] The South Australian Royal Commission, on the other hand, could not just be ignored. Its attitude to cannabis had been foreshadowed by a 'discussion paper' published by the Commission well before the *Final Report* was issued. Regrettably, this attempt to prepare the electorate for its conclusions

backfired. Its proposals for cannabis reform dominated political debate and media coverage to the exclusion of all else, and the Commission's outspokenness on this one issue discredited it in the eyes of many people for whom, as we have seen, marijuana was a powerful symbol of deeper fears. Petitions of protest, signed by any number from twenty to 15 000 voters, flooded the parliament. The Liberal Party, which had originally demanded a full inquiry, accused the Commissioners of 'promoting a particular point of view' (as if Commissions shouldn't come to conclusions!), and called for its termination.[51] It was clearly trying to wind up an inquiry with which it disagreed.

The 'cannabis commission', as it was commonly called, was too controversial for the government's liking, too. Ill health forced Don Dunstan to retire and the newly installed Premier, Des Corcoran, announced that there would be no legislation reforming cannabis laws regardless of what the Commission said. The *Final Report* was laid on the table and ordered to be printed on 31 May 1979, but no Ministerial statement was ever made outlining the government's reaction to it, and its contents were never debated in the House.[52] Shortly afterwards, the Labor government was defeated at the polls and the work of the Royal Commission, tainted as a Labor initiative as well as for its conclusions, was condemned to gather dust on the shelves of the parliamentary library. Its history had demonstrated once again that political parties in Australia, whatever their complexion, were united in their support for a meta-legal orthodoxy which was familiar and politically safe.

It was the best of times; it was the worst of times; it was the age of credulity; it was the age of disbelief; it was, above all, the age of the Royal Commission. In part this was due to a genuine recognition that the problems of drug use were not going away, and that a more impartial evaluation of the issues was needed. But appointing a Royal Commission also gave governments, under pressure to 'do something' about drugs, an excuse for inactivity while also demonstrating their concern. On the other hand, the controversies surrounding the inquiries in the Senate and in South Australia were unwelcome to governments, which in general showed no interest in changing their way of thinking. By the late 1970s, Royal Commissions were no longer given such a free rein. They were subject to much more limited terms of reference, the purpose of which was to guide the inquiry in the directions preferred by governments; they were, in general, headed by men with a narrow and legalistic approach to the problems they were asked to address. Turgid in style and limited in scope, they became not tools for re-evaluation, but a means of further entrenching and improving the functioning of the established legal order.

The work of the Senate Standing Committee and the South Australian Royal Commission provoked a direct reaction from the New South Wales Joint Committee of the Legislative Council and Legislative Assembly upon Drugs. Although a memorandum issued by it in 1977 had proposed a minor reform to cannabis law, its general tenor was extremely conservative. In its *Progress Report*, the Chairman, V. Durick, pointedly criticised the Senate

Standing Committee for dealing with alcohol and tobacco, but not the opiates. Furthermore, while previous reports had consciously tried to divest the debate on illegal drugs of emotion and exaggeration, the Joint Committee adopted a sensationalist tone. The traffic in heroin, for example, was said to constitute 'an insidious threat to Australian society which has been unsurpassed in the country's history', while the use of heroin was compared to myxomatosis in rabbits.[53]

Events soon overtook the Joint Committee. On 15 July 1977, shortly after the progress report was tabled, Donald Mackay, a leading anti-marijuana campaigner, disappeared from his home in Griffith, New South Wales. His presumed death at the hands of drug traffickers in a town with a large Italian community, which was said to be the centre of cannabis cultivation in Australia, brought together two deeply held fears; first, the fear of marijuana, and second, the fear of organised crime. The Wran government responded by establishing its own Royal Commission. Its terms of reference represented a significant change from previous reports. Legal drugs were explicitly excluded. The Commission was directed to report upon the identity of persons involved illegally in the cultivation, manufacture or supply of illegal drugs. Mr Justice Woodward, the Commissioner, was only to recommend changes in drug law and administration. This was to be no broad inquiry into questions of treatment, education or social policy. This was an inquiry directed towards the 'what', 'who', and 'how' of criminal drug activity, and not the 'why'. It gave priority to the evils of traffickers and the importance of law enforcement. True to its name, it was a Royal Commission into Drug Trafficking and not into drugs.[54]

The vast *Report* tabled two years later, almost 2500 pages in three volumes plus a *Further Report*, concentrated inordinately upon cannabis distribution networks in New South Wales—much of volume one and most of volume two. Alfred McCoy, whose book *Drug Traffic* appeared shortly afterwards, accused Woodward, with considerable justification, of hyper-sensitivity to criticism, self-importance, racism, 'pseudo-psychology, second-hand analysis and speculative enquiries' in his attempts to detect and prove 'Organized Criminal Activities within the Italian Community in Australia'.[55]

Where Senator Baume and Professor Sackville had queried the value of law enforcement strategies, Mr Justice Woodward sought only to improve them. As he emphasised, his terms of reference related not to medicine or sociology, but to 'the administration of the law'. He kept closely to this narrow brief. He was comfortable discussing inter-agency co-operation and the development of intelligence facilities, listening devices, sentencing principles, the forfeiture of assets and so on. Indeed on these issues, he was by no means supportive of all police demands for increased powers. But while Senator Baume and the South Australian Royal Commissioners had often found, during the course of their broad inquiries, that their most fundamental assumptions were being challenged and needed to be carefully reassessed, Mr Justice Woodward floundered, distinctly uncomfortable with such general questions.

The major problem is that this area of debate revolves around certain ethical or moral beliefs about drug use which differ from one group to another and are virtually irreconcilable.

By figuratively shrugging his shoulders, he tried to maintain the objectivity of his report. But in fact all he did was conceal and leave unexplored his own ethical principles. On the question of cannabis, for example, the Commission merely re-hashed a shopping list of arguments for and against legal reform. His own opinion, opposed to any significant change in its legal status, was presented as if it was the only reasonable stance to take unless a conclusive case for reform could be presented. And proposals for reform were rejected simply because they were not perfect solutions. No change was found to be a complete answer, so the Woodward Royal Commission advocated virtually no change.[56]

The method and emphasis of the Commission reflected exactly the meta-legal approach. Issues which operated upon the legal system without altering its principles predominated. The evil image of the drug trafficker was shored up. Any analysis about the basis of drug control policy in Australia was avoided. The validity of the status quo was assumed but not discussed, and presented without context or justification, as if it were a kind of neutral policy without costs or dangers of its own. Unsurprisingly, Wran proclaimed the Commission 'the most refreshing, positive document about drug use, drug abuse, and drug peddling and trafficking thus far published in Australia'.[57]

Further reinforcement for the maintenance of the status quo in Australia came from the Australian Royal Commission of Inquiry into Drugs (ARCID), established by the Fraser government in late 1977 as a direct response, according to Senator Baume, to the radicalism of the Senate Standing Committee report tabled that year.[58] The Commissioner, Sir Edward Williams, was appointed by the governments of the Commonwealth and the States of Victoria, Queensland, Western Australia and Tasmania. At that time then, three separate Royal Commissions were operating simultaneously, one in South Australia, one in New South Wales, and one in every other Australian jurisdiction. Together, their reports alone totalled over 5000 pages. Their sheer volume demonstrated the prominence of drug issues in Australia, and the public's desire for answers and reassurance. But each Commission proved more orthodox in its analysis than the last.

Of the three, the ARCID was the most limited by its terms of reference. Mr Justice Williams was instructed to inquire into illegal drug importation and trafficking, illegal use, the extent to which such illegality was being pursued on an 'organised basis' and, finally, 'the adequacy of existing laws ... and of existing law enforcement'. Even more than the Woodward Royal Commission, ARCID was expected to assume that 'the drug problem' concerned only illegal drugs and was simply about trafficking, law enforcement and organised crime.[59]

These assumptions the Commission's report did not doubt. Consider the colour plates that adorned the preface. The first picture was of a single opium

poppy, and the last of a cannabis plant. Between these photos of natural beauty lay maps of world drug production and traffic routes, and page upon page of clinical photographs—Buddha sticks alongside the dismantled radio in which they were hidden, sachets of heroin next to the objects in which they were concealed, and so on.[60] There were no people in these pictures, only objects: agents of corruption and places of secretion. For Mr Justice Williams, the 'drug problem' was not about people at all, but simply about law enforcement, about the prevention of illegal importation and distribution. And what of the only two living things in these pictures, so tastefully photographed? Our reaction to them is coloured by the images juxtaposed between them. *Papaver somniferum* and *cannabis sativa* seem to be presented like wanted posters, warning us to be on our guard. We may have begun by thinking that the opium poppy looked beautiful, but by the time we have reached the cannabis plant on the last page, we know better. Theirs is not the sweet beauty of innocence, but the cloying beauty of evil.

With his sympathies illustrated so vividly, Mr Justice Williams's emphasis on law enforcement, administration and the prevention of importation was predictable. The interim report he submitted to the Commonwealth on 19 September 1980 dealt in particular with the interrelationship of various enforcement agencies, and the functioning of the Federal Narcotics Bureau (FNB): this is a specific issue that I will discuss shortly. Likewise in the 'National Strategy' which he outlined in his final report, coastal surveillance, police co-operation and intelligence activities, powers of search and telephonic interception, inter-agency and interstate co-ordination were his central concerns. The drug legislation he proposed also focused on adequate police powers and institutional efficiency.[61] The drug problem was, to the ARCID, a question of the effective implementation of policy and not its formulation. If only the police did their job well enough, the problem would disappear.

When it came to fundamental issues of drug policy, the ARCID was all at sea. Like Mr Justice Woodward before him, Mr Justice Williams was unwilling to recommend any change unless the arguments were, to him, absolutely conclusive. The status quo emerged victorious by default. On cannabis, for example, his only concrete recommendation was that the convictions of persons under 21 years of age should be expunged after one year. Otherwise, he called for a ten year 'moratorium' in order to 'put aside polemics and to enter upon a period of balanced consideration of the issues of cannabis', during which period 'no relaxation of the present Australian prohibition on cannabis should be made'. A finer justification for inactivity could scarcely be imagined. Yet even this seemed too radical for governments. The Premiers' Conference held in June 1981 'deferred a decision on a recommendation of the ... Williams Report—that the laws relating to legalization of marijuana be considered in 1990.' In other words, the Premiers were not even prepared to decide to decide nothing for another ten years.[62]

Senator Don Chipp, who by now had left the Liberal Party to found the Australian Democrats, was one of ARCID's harshest critics. Remarkably, it

was cannabis which excited Chipp's most scathing comments. Like Saul on the road to Damascus, Chipp had undergone a conversion since his days as Liberal Minister for Customs and Excise, although a change in his opinions had not changed his strident style. He described Williams's approach to cannabis as 'a gigantic cop-out, a disgraceful cop-out ... a pack of rubbish'. Beyond these insults, however, Chipp recognised that the central point of Williams's report was his concentration on law enforcement. 'There is nothing innovative in it. There is only an obsession—that is all I can call it—with cutting off the supply. It is like a fairyland.'[63]

Yet for exactly these reasons the government supported the thrust of the Commission. It had served its purpose. Debate on drug policy in Australia was safely entrenched in meta-law: the Ministerial Statement on ARCID discussed police co-operation and co-ordination, intelligence and information facilities, coastal surveillance and smuggling prevention, international initiatives; the Labor opposition responded on the same level. It delighted in quoting scandalous examples from Williams's report, such as that of the customs launch which broke down eighty-three times from Eden to Brisbane, or the customs houses in northern Australia—Australia's first line of defence against drug importation—which were only open during office hours. With some exceptions, it served both major political parties and governments around Australia to assume the validity of the structure of drug legislation in Australia and concentrate instead on point-scoring over administration and enforcement.[64]

A New Bureaucratic Consensus

The Commonwealth Department of Customs and Excise may have hoped to reinforce the political triumph of meta-law with its own triumph over rival bureaucracies. But long-standing rivalries coupled with its own ambition found the FNB isolated. It was viewed by State health departments as a police force playing with health issues, by State police forces as a bunch of bureaucrats playing at police work, and by almost all State bodies as a symbol of Commonwealth intrusiveness. Resentment grew in those bodies ideologically aligned with it as well as those to which it was ideologically opposed. In 1979 it was alleged that the Bureau had been infiltrated by persons involved in drug trafficking; circumstantial evidence linked an officer or officers of the FNB itself with the disappearance and murder of the two New Zealand drug couriers who made the allegations. Commissioner Bates tendered his resignation on 1 June and then withdrew it three days later. These matters raised fundamental questions about the 'quality, honesty and integrity' of the Bureau.[65]

Matters moved swiftly. In keeping with its law enforcement and administrative perspective, the ARCID investigated the 'notoriously poor' relationship of the FNB with other police forces. Its interim report excoriated the FNB mercilessly. The FNB's detectives and inspectors were inexperienced,

yet claimed for themselves special expertise in the pursuit of drug traffickers, thus breeding 'an unjustified elitism'. They were viewed by other police agencies as ambitious, secretive, uncooperative and inefficient. Officers of the Bureau themselves described it as 'hopeless', 'completely incompetent', 'shocking', and 'the worst trained, worst disciplined and worst equipped law enforcement agency in Australia'. The very first recommendation of Williams's report was that the FNB be disbanded and that the Customs service in future confine its energies to 'the [customs] barrier' and not beyond.[65]

The execution of the FNB, like that of the New South Wales Pharmacy Board before it, was complete and sudden. Some, like Don Chipp, who had been so proud of the FNB when he had been Minister, still preferred to blame its demise on the jealousy and corruption of other police forces. But few had his faith and Williams's criticisms were supported, if support were needed, by equally scathing passages in the Woodward Royal Commission. The Bureau was dismantled, 'virtually overnight', on 8 November 1980.[66] Customs' power over the control of 'narcotic drugs', which had grown steadily since 1905 as it gradually slipped its constitutional leash and expanded its influence into all areas of drug law enforcement, thus expired. It had been the victim of over-ambition and rivalry.

The re-emergence of the Commonwealth Department of Health as the principal bureaucracy dealing with drugs of dependence, however, did not lead to a re-evaluation of the meta-legal priorities advocated by Customs. In the first place, politicians had replaced bureaucrats as the prime determinants of policy. In Queensland, we have already seen how the power and independence of the Department of Health was steadily eroded—from the end of legal maintenance to the Cabinet defeats of the Health Minister, Llew Edwards, the department's advice had become less and less important. On a federal level, a booklet on cannabis was prepared by the Commonwealth Department of Health in 1978. Its purpose was merely to marshal the arguments on both sides of the debate about the medical dangers and legal status of cannabis. But even this was too much for the Commonwealth–State Ministers' Meeting, which suppressed its circulation. Commonwealth Health Minister, Ralph Hunt, said:

I do not want to see, with our imprimatur upon it, a document which creates unnecessary confusion and gives arguments to people who are trying to push a cause with which the States do not agree.

The impartial opinions of the Department of Health were concealed from the public simply because they were said to be 'inconsistent' and full of 'lots of different pieces of information'. When bureaucratic advice refused to bend to the wishes of politicians, it was now routinely ignored.[68]

But the health bureaucracy had not just lost its sovereignty. It had also lost its character. The Commonwealth Department of Health had for many years been a small, professional, tightly knit department with high morale, dominated by doctors and committed to principles of health advancement. It

was, as a number of past members of the department told me, a place with a sense of mission. Since the 1950s, as we have seen, both political influence and bureaucratic power led medical authority over drugs to be consistently undermined by bureaucratic constraints. At the same time, the Commonwealth Department of Health no longer allied itself so closely with the medical profession. During the 1970s the department became increasingly dominated by administrators with no particular commitment to health issues, whose expertise was bureaucratic, not medical. Legislation which had previously required that the Director-General be a medical graduate, was repealed. The position of Director-General became an administrative position like any other departmental secretary and the department likewise lost its unique identity.[69] As drug policy was demedicalised, so too was the Department of Health.

Once the Department of Health stopped approaching drug policy from its own special perspective, there seemed no reason for it to doubt the accepted wisdom. The natural bureaucratic tendency towards incremental growth and the better administration of the status quo took over. Indeed, the department's increased power following Custom's demise was itself an influential factor. It was no longer an outsider in the field of drug policy. The New South Wales and Victorian Departments of Health, no less than their Commonwealth counterparts, had in the past expressed some doubts about the merits of prohibitionist policy. By the late 1970s, however, they too had taken over responsibility for drug policy and administration. Within the mainstream more than ever before, State and Commonwealth health departments alike were finding the acceptance of meta-legal orthodoxy easy and convenient. They had, in short, been co-opted. It is not that power corrupts, but that the exercise of power gives no-one the time or the inclination to question its validity.

Those who still held fast to the old medical values of the department found themselves isolated. Dr Les Drew, the Commonwealth's Senior Medical Adviser on Drugs of Dependence and a Salvation Army officer with a proselytising spirit, found little sympathy or support within the department for his views. In 1980, for example, he wrote an article for the *Medical Journal of Australia* entitled 'Drugs: Time for Honest Debate', in which he argued that the distinction between legal and illegal drugs was irrational, that the 'current repressive approach' had not proven successful, and that 'a full exploration of ... costs, dangers and limitations' of new initiatives and alternatives was required. So alienated was Drew from those whom it was his job to advise, that he wrote under a pseudonym and was hauled over the coals when his authorship was discovered.[70] By 1980 Drew, whose views differed little from the department's approach under Directors-General Cumpston, Metcalfe, or Refshauge, felt impelled to behave like a media partizan to get his message across. Waxing political influence and waning medical power, health departments' own bureaucratisation and their co-option within the established system of drug control, had all led to a homogeneity of vision. Customs lost the battle, but their approach seemed to have won the war.

9

A THOROUGHLY MODERN MELEE

Twin Policies of Containment
in Contemporary Australia

Introducing Mr Big: The Changing Face of Australians' Fears

Increasingly detailed and Draconian legislation had failed to prevent rising levels of illegal drug use, addiction and conviction. Mr Justice Woodward calculated that there were 'approximately' 9257 regular heroin users in New South Wales in 1978. In Victoria, in 1979, 2563 cannabis offences were dealt with, and 580 involving heroin, a rise of 700 per cent in only four years.[1] Particularly in relation to marijuana, the courts were treated to an unending procession of young people facing the stigma of a criminal conviction. Poor or middle class, long-term unemployed or ambitious university students, many of them regretted not their actions, but their consequences.

The age of Royal Commissions had turned potential danger to the status quo into victory not by words, but by the silences between them. But they also reflected a subtle change in attitude. After the first opium laws had been enacted, drug use had been seen as a sin because it challenged the sanctity of the law. In later years, as the medical model of addiction gained favour, addicts came to be characterised as persons whose obsession robbed them of the power of intention. Their illegality was not their fault. For them, according to Woodward, 'the ability to choose to act wisely, or to modify behaviour, is limited or eliminated'. But traffickers were still seen as sinful; their illegal behaviour was a choice and they were therefore responsible for their actions. Thus ARCID recommended the enactment of two separate pieces of legislation in order 'to reflect the distinction between criminal exploitation of drug abuse and the social plight of the individual drug user'. The proposed Drugs of Dependence Act punished minor offences including possession and use. It accepted that users were sick and in need of help; penalties were relatively slight, and the emphasis was placed on treatment and community services. The proposed Drug Trafficking Act was designed to facilitate the detection and punishment of trafficking. It assumed that the drug problem was a question of law enforcement requiring stiff penalties, broad search powers, and complicated provisions for the forfeiture of assets.[2] Illness and vice were treated in isolation as if the problems they addressed were unrelated.

As drug use escalated, trafficking became more profitable and, consequently, better organised. Where originally importation, cultivation and distribution had been undertaken on a largely *ad hoc* basis by people who were mostly users themselves, it was now increasingly well co-ordinated. Individual growers (of cannabis) and smugglers (of heroin) continued to exist, of course, but they now shared the market with carefully organised business ventures, some structured with the complexity of a large corporation. The organism of community concern was likewise in transition. The Woodward Commission, and its *Further Report* in particular, concentrated specifically upon organised trafficking. Mr Justice Williams, too, saw organised

crime and not drug use itself as the main enemy, warning that:

the illegal importation and the illegal production and illegal trafficking in drugs are engaged in both directly and indirectly by persons who engage on an organised basis in other illegal activities both related and not related to drugs.[3]

On the one hand, 'organised criminals' were the epitome of the old (and often false) image of the trafficker as a mercenary preying upon the weakness of others, for they had no involvement in drugs except as a profit-making venture. But, on the other hand, organised crime is feared because of the way in which it institutionalises criminality. This has nothing to do with drugs and everything to do with our concern that law-breakers may become a powerful force in our society, influencing and corrupting governments and effecting legal change outside of the democratic process. It is the notion of a conspiracy to subvert the law, which organisation implies, that raises concern. Furthermore, the evil consequence of organised crime is rarely contended to be the suffering which the drugs cause. Rather, it is the wealth and success of the criminals themselves which stirs up frustration and ire. Organised crime breaks the law and gets away with it. It exists for profit, and is profitable. This implies that violence and corruption, if comprehensive enough, may be rewarded.

This new focus on organisation and profit made the drug problem more than ever into a question of law enforcement. Drug legislation was seen as a means to combat economic crime perpetrated by wealthy trafficking institutions, and not as either a moral or medical imperative. The user, the addict, and the pedlar were all of little importance. In 1979, the federal Liberal government enacted amendments to the *Customs Act*. Provision was made for body cavity searches in certain circumstances, and the use of listening devices for the purpose of narcotics enquiries, even in the offices of lawyers known to represent suspected drug traffickers. In line with the recommendation of the NSCCDD, a new sentencing concept was introduced, that of a 'commercial quantity' of narcotic drugs, corresponding as a rule to an amount one thousand times the 'traffickable quantity'. Persons convicted of an offence in relation to a 'commercial' quantity became liable to a maximum penalty of imprisonment for life (the court was required to impose a gaol term and not simply a fine). A person convicted of a second offence in relation to a 'traffickable' quantity was likewise liable to life imprisonment. In contrast, the maximum penalty for a first traffickable offence was twenty-five years' imprisonment and/or $100 000 or, in the case of cannabis, ten years' imprisonment and/or $4000. Those for whom the drug traffic was not just business, but big business, were clearly being singled out for special treatment.[4]

The Act also established a system for the 'recovery of pecuniary penalties for dealings in narcotic goods'. While provision had always existed for the forfeiture of assets which were the proceeds of crime, it was difficult to prove

that a particular asset had in fact been purchased by 'drug money'. In 1979, a new process was introduced. Under section 243B, the court decides if a person has 'engaged in prescribed narcotic dealings' and then assesses 'the value of the benefits derived' thereby. The defendant is then subject to a 'pecuniary penalty' equal to that value and payable out of *all* of the defendant's property, however acquired. Furthermore, since an action under this section is not technically a criminal matter, the prosecution only has to prove on the balance of probabilities that 'prescribed dealings' took place.[5] Accordingly, it is quite possible for a person acquitted of a criminal offence against the *Customs Act* (which requires proof beyond a reasonable doubt), nevertheless to be required to pay a vast fine.

These provisions aroused hostility on both sides of the House. Former Liberal Prime Minister, William McMahon, declared himself 'dumbfounded' and 'bewildered' by the system of pecuniary penalties. He and Tasmanian MHR, Michael Hodgman, particularly concerned by the effect of the provisions relating to listening devices on the long-standing doctrine of legal professional privilege (according to which nothing said by a client to their lawyer in confidence can used as evidence in court), crossed the floor. The government was unmoved. The relevant Minister, Wal Fife, said:

The Government recognises that these provisions contain harsh elements. No apology is made for that fact. It is part of an upgrading of the war against drug trafficking.

This was how the war was to be waged. The presumption of innocence, the burden of proof and the doctrine of privilege were all expendable. Yet even those opposed to the Bill did not disagree. Both McMahon and Hodgman were concerned about the use of listening devices in lawyers' offices to aid in the prosecution of other offences, such as 'murder' or 'homosexuality'. Their complaint was that the 'exceptional law' put in place was not 'restricted totally to narcotics and drug traffickers'.[6]

Extremism was not a new feature of drug laws, but users and pushers had been toppled from their plinth in the pantheon of evil. 'Commercial' penalties and complex forfeiture provisions were clearly addressed to those for whom the drug trade was big business. They were aimed at taking the profit out of drugs not just as a means of slowing the supply of illegal drugs to users, but because the profitability of the trade was itself the central evil.

In 1980 Alfred McCoy's book *Drug Traffic* was published, subtitled 'Narcotics and Organised Crime in Australia'. The two were almost synonymous by this stage. The illustration on the cover was the hand of a man dressed in a pin-stripe suit clutching a wad of money.[7] The new images associated with drugs more and more related to business. People spoke of 'Mr Big'. According to Victorian MLA, M.T. Williams, speaking in the Victorian parliament, the drug trade was controlled by 'multi-million dollar financiers' who were 'wicked men' and 'evil monsters'. 'Drug abuse is not an alternative lifestyle,' he continued, 'it is a vehicle for organised crime to

control this country.' Tom Roper, the Victorian Minister of Health, in the second reading speech on the Drugs Poisons and Controlled Substances Bill 1983, also insisted that 'the new dimension of drug abuse was its promotion for profit, the involvement of organised crime'.[8] In these ways, then, illegal drug use was no longer seen as an evil in its own right.

There was no Mr Big: no one person or group of persons in charge of drug smuggling in Australia. But the image conjured up by this fiction, which stood at the apex of drug trafficking in Australia, was a potent new symbol of evil: he was a businessman whose wickedness stemmed from his respectability, his power and his wealth. Mr Sin, the symbol of the Chinese drug fiend, was also vilified for making a profit out of the misery of others, but his evil had been apparent in his fetid premises and bloated body. The evil of Mr Big, however, lurked beneath the surface, and its very concealment made it still more feared. The eponymous Mr Sin was replaced by the anonymous Mr Big. And while Mr Sin was hated for what he did to his victims, Mr Big was hated for the wealth he accrued and for his respectability and apparent immunity to prosecution. The drug trade was not a question of health or morality, but of economics and power.

The flurry of Commissions continued, ever more limited in scope and reflecting these perspectives. In 1981 and 1982, the collapse of the Nugan Hand bank and its associations with the drug trafficking syndicate of Terence Clark became questions of great political controversy. The 1983 report of the Royal Commission of Inquiry into Drug Trafficking, under Mr Justice Donald Stewart, was a paper chase into the complex financial interests of the Clark group and Nugan Hand. It was an impressive exercise in economic detection, but it was a dry, legalistic and economic document totally devoid of social content or social context. The Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (under Frank Costigan, QC), set up shortly after the Stewart Royal Commission, was an inquiry into organised criminal activities in many areas; it too demonstrated that drug trafficking was seen as merely one aspect of a broader problem.[9]

A Split Personality?

The distinction between users and big-time traffickers, which the focus on Mr Big entrenched, made little sense, for the two are inextricably linked. It is naive to think that if only the activities of traffickers could be restricted, demand for the use of cannabis or heroin would disappear. There is a real demand for these drugs arising from the complex social and personal reasons for their use; and while there is a demand, there will be people prepared to take the risk of supplying. It is also unrealistic to expect that we can ever intercept more than a small percentage of the total volume of drugs smuggled into this country, no matter how harsh the laws or how powerful the police.

The use of and traffic in drugs are connected in other ways, too. On the one hand, if drug use itself were not prohibited, the drug trade would no

longer be either a magnet for organised crime or as profitable to those involved. On the other hand, both the illegality and evil of trafficking are predicated upon the illegality of possession and consumption. Trafficking is illegal because it entices illegal possession; it is seen as evil at least partly for the same reason. Laws against trafficking historically developed as a means towards the more effective prevention of the crimes of possession and use. They were, in other words, tools in the suppression of the use of drugs. Ironically, the situation was now reversed. The suppression of drug use was mattering less and less. Governments, meanwhile, did not stop to consider whether the focus on trafficking was an effective way of reducing either drug use or crime.

The emphasis on Mr Big as an evil in his own right allowed a less severe approach to drug users by removing them from the centrality of drug laws. The harsh penalties imposed on marijuana smokers and other users of drugs could be softened without undermining 'the war on drugs'. The dichotomy between 'illness' and 'vice', to which I have frequently had recourse in explaining public attitudes to drug use, no longer held. While legislation focused on the 'Mr Bigs' of trafficking, drug users themselves were seen as neither patients to be treated nor villains to be harried. They were, to a large extent, seen as secondary: by-products or victims of the traffickers' business.

Every State in Australia rewrote drug legislation during the 1980s. The *Drugs, Poisons and Controlled Substances Act 1981* (Vic.), enacted in the last months of the long-lasting Liberal government in that State, was typical of those that followed. It was in every respect a thoroughly modern drug law, vastly complex—135 sections long and accompanied by over one thousand separate regulations—and comprehensive—schedule 8 now included 122 items, ranging from amphetamines, cannabis, cocaine, heroin, methadone, morphine, and pethidine, to every analogue, synthetic and derivative yet devised. In addition, schedule 7, which dealt with 'dangerous' and 'special' poisons subject to particular controls, included, along with cyanide and strychnine, LSD, mescaline, psilocybin and other hallucinogens. The content of the Act as a whole, however, was unsurprising. 'The key to the drug problem,' said W.A. Borthwick, Minister of Health, 'is the availability of drugs and the main object of this bill is to make it less attractive to traffic in drugs'. A person found guilty of trafficking in a 'drug of dependence' could be sentenced to twenty-five years' imprisonment and, in addition, a fine of up to $250 000 (accompanied by the familiar provision that possession above the prescribed amount was treated as trafficking unless the defendant could prove the contrary). 'Trafficking drugs of dependence is such a heinous offence,' explained the Minister, 'that the courts should not have an option of imposing a fine in lieu of a gaol sentence.'[10]

Some small alterations were made to the harsh edges of the law. Part X of the Bill established a Drug Rehabilitation and Research Fund to receive all moneys obtained from 'fines penalties and forfeitures'. Money obtained from traffickers was to be used for treatment facilities, research, and community education. On cannabis, however, the Act was equivocal. It was categorised

as a 'narcotic plant', cultivation of which carried a maximum penalty of ten years' imprisonment or $100 000, or both. But cannabis was not defined as a 'drug of dependence' and, consequently, the maximum penalty for trafficking in it, while still severe (ten years or $100 000, or both), was somewhat less than that which applied to other drugs.[11] Those who designed the Act perhaps recognised that the sale of cannabis to a willing buyer was not as exploitative as the sale of heroin to an addict, and that many marijuana 'traffickers' were in fact only performing a service to their friends. In this way the Act acknowledged, if only to a limited degree, a clear distinction between cannabis and other illegal substances.

Upon the election of the Victorian Labor government in 1983, substantial amendments were prepared. The *Drugs Poisons and Controlled Substances (Amendment) Act 1983* (Vic.) showed that the new Ministry, like other Labor governments around the country, was prepared to lessen the excesses of drug policy, but not to question its fundamentals. The Act introduced an even heavier penalty for trafficking in a 'commercial quantity' of a drug and introduced in addition to fines and imprisonment a system of 'pecuniary penalties' similar to that which operated under section 243 of the Commonwealth *Customs Act*. In contrast, the amended Act lessened the penalties applicable to 'users or addicts' and other 'minor offenders'. The cultivation of marijuana 'not committed for any purpose related to trafficking' became liable to a maximum penalty of only $2000 or one year's imprisonment, or both (previously $100 000/ten years); possession of a 'drug of dependence' not for trafficking, $3000 or one year's imprisonment (previously $5000/two years); and use of a drug of dependence other than cannabis, $3000 or one year's imprisonment (previously $5000/two years). Furthermore, possession or use of a 'small quantity' of cannabis (less than fifty grams) became liable to a penalty of no more than $500. In this way, in Victoria at least, the most criticised aspects of drug policy were ameliorated.[12]

The reforms that emerged in other jurisdictions were similarly driven in apparently contradictory directions. First, meta-law directed at the economic profitability of trafficking expanded. By 1989 every State in Australia had enacted maximum penalties of, typically, twenty-five years' imprisonment and in addition, and not as an alternative, a $250 000 fine for the trafficking of a 'commercial quantity' of a drug.[13] In some jurisdictions the same offence attracted penalties of $500 000 or life imprisonment. Furthermore, provisions in all jurisdictions deemed a person in possession of more than a specified amount of illegal drugs guilty of the more serious trafficking offences unless they could prove their innocence. South Australia and Queensland, while their forfeiture provisions were not as severe as those enacted by Victoria or the Commonwealth, provided that where the profits of drug trafficking could not be traced to specific property or investments liable to forfeiture, the offender could still be required to pay an amount equal to that profit, out of all their assets whether legally acquired or not.[14] In those circumstances, the maximum fine levied on trafficking offences became irrelevent. Forfeiture provisions were a system of punishment directly pro-

portional to profit and capable of imposing unlimited fines.

Meta-law directed at drug traffickers progressed in other ways, too. Internal body searches and the use of listening devices were allowed in some jurisdictions. Commonwealth legislation concerning telephonic interception, police powers, and the forfeiture and tracing of assets, greatly multiplied.[15] Around Australia, police powers of search and entry were gradually expanded and included the right to search people, vehicles and (in some States and some circumstances) premises without a warrant.[16]

Second, as the mere use and possession of drugs became a side-issue, more and more laws actually softened the effect of prohibitionist drug policy upon users themselves. In some jurisdictions, laws were enacted to encourage the treatment of drug users as an alternative to their imprisonment. In both South Australia and the Australian Capital Territory, the court, on the advice of an assessment panel, may order the treatment of an offender, with their consent, in which case the court may decide not to record a conviction in the case.[17] But while these laws were to some extent a reflection of the medical model of addiction that we have seen ebb and flow over the previous century, they were, even more, a demonstration that laws directed at possession and use were seen as unimportant. Thus, just as penalties for large-scale trafficking increased, penalties for the mere possession of small amounts of illegal drugs actually decreased. Marijuana laws in particular, the focus of such widespread civil disobedience and social criticism, began to change. In the Australian Capital Territory, a penalty of only $100 had applied to the possession of under twenty-five grams of marijuana since 1975 (a similar penalty in the 1989 Ordinance also applied to the cultivation for personal use of less than five cannabis plants). A $500 maximum penalty was introduced in Victoria in 1983 and in South Australia the following year.[18] In every jurisdiction in Australia, moreover, marijuana trafficking attracted a lesser penalty than trafficking in other illegal drugs. Clearly these changes were substantial. They seemed to be an admission that marijuana smoking could not be outlawed. But at the same time, they fell carefully short of decriminalisation. The principle of illegality was studiously protected, while the effect of prohibition was undermined.

The political emphasis on Mr Big, while it permitted the enactment of these reforms, also ensured that criticism of drug policy in Australia was contained within manageable limits. Possession and use were still criminal offences, with all the implications this had for the high cost of the drug, the alienation of users, the environment and subculture of use, the social consequences of conviction, and the way drug use was perceived in society. But pressure for a comprehensive reconsideration of these issues was able to be dissipated by careful compromises and minor amendments exactly because drug users themselves no longer mattered. On the other hand, emphasis on 'the drug trade' shored up the legitimacy of drug legislation by directing public attention to an area of unquestioned evil. The new consensus on the importance of meta-law, which had developed in the late 1970s, held firm, backed by political rhetoric which became more impassioned as penalties

grew higher. Terry Sheahan, the New South Wales Labor Attorney-General, introducing the Drug Misuse and Trafficking Bill 1985, said of 'greedy ... drug entrepreneurs' that they would be given 'no quarter':

they will be hunted down with sophisticated weaponry; when caught they will be vigorously prosecuted; when convicted they will be stripped of their ill-gotten gains; when sentenced they will face the most severe penalties that the Courts can impose.[19]

In every State, drug trafficking became a step-motherhood issue, universally agreed to be bad but nevertheless repeatedly trotted out for advantage. Few thought to question this attitude. Few wondered if the causes of the increasing involvement of organised crime lay any deeper than the size of the penalties that those convicted faced. The emotional response everyone felt towards the Mr Bigs of this world drew attention away from the weaknesses of the structure of drug legislation itself and towards its populist façade.

Labor in Power 1983–1985

Labor governments, as well as conservative ones, generally supported these principles. There was nothing radical in the *Drugs Poisons and Controlled Substances (Amendment) Act 1983* (Vic.); the *Drug Misuse and Trafficking Act 1985*, introduced by the New South Wales Labor government, was in fact harsher than the laws it replaced and restructured. Although it introduced a complex gradation of penalties that distinguished between the moral position of the user and the large-scale trafficker, providing different maximum penalties for the cultivation, manufacture or supply of a 'small quantity', a traffickable quantity, an 'indictable quantity', or a 'commercial quantity' of a prohibited drug or plant, no distinction was made between the traffic or possession of cannabis and other drugs except where the amount concerned was an 'indictable' or 'commercial' quantity. In contrast to the position in Victoria and South Australia, the penalty for the possession of any quantity of cannabis was still up to $2000 and/or two years' imprisonment and, for 'commercial' trafficking in the drug, $500 000 and/or twenty years' imprisonment. The only difference was that commercial traffickers in other drugs could be imprisoned for life.[20]

Take also the federal Labor Party which, while in opposition, had not been uncritical of orthodox drug policy. Dr Neal Blewett, for example, a South Australian philosophy lecturer and member of the Council of Civil Liberties, was a strong advocate of marijuana law reform in the 1960s. Ten years later, Professor Blewett presented an influential paper to the South Australian Royal Commission, and another to the Williams Royal Commission. After the election of the federal Labor government in 1983, Dr Blewett became Minister for Health, a position he held until 1990.

The Trojan horse proved, however, low on horsepower. Shortly after his

appointment, Dr Blewett let slip his opinion on cannabis in a television interview. The resultant furore demonstrated to him that a candid politician would soon be out of a job. His opinion threatened to alienate him not only from many people in the community, but from many of his more conservative Labor colleagues, too. Choosing to save his energy for 'more important health issues', he ran dead on the question of cannabis. It must be said that by defusing the cannabis issue, State policies on the issue have been allowed to develop without interference, and these policies have in some jurisdictions led to significantly lower penalties for marijuana use and possession. Marijuana smokers in general risk nothing like the persecution or punishment they encountered fifteen years earlier, and for this credit must be given to the policy of gradual non-confrontational change adopted by politicians like Dr Blewett.[21] None the less, this approach has made any complete reform of cannabis laws less and less likely. Political and social pressure for reform has faded away and the matter has been taken off the agenda—yet the possession of marijuana remains illegal. The integrity of the structure and principles of drug legislation have been maintained unimpaired, and a confrontation, which at one point challenged the assumptions behind the whole system of drug control, has dwindled to nothing.

Meanwhile, the war against Mr Big continued apace. In 1984, responding to public concern about the influence of organised crime especially in relation to the drug trade, the government established the National Crime Authority (NCA). The purpose of the NCA was to ensure that the inquiries begun by Justice Stewart and Frank Costigan did not die out; it was, in effect, to be a standing Royal Commission on organised crime, chaired first by Justice Stewart himself, whose previous report had marked him as a man cut out for just such a law-enforcement oriented task.[22] Since then the NCA has operated in a blaze of secrecy. Undoubtedly, its first priority has been the investigation of the relationship between organised crime and drug trafficking. The resources allocated to it, its broad powers and its covert operations have emphasised still further that the 'war against drugs' must now be waged with sophisticated equipment and unique powers of investigation and enforcement. The establishment of other bodies like the New South Wales State Drug Crime Commission and the Australian Bureau of Criminal Intelligence, have similarly enforced the belief that the 'drug problem' is all about the efforts of elite police to track down high-rolling Mr Bigs.

In the run-up to the 1984 federal election, the then Prime Minister, Bob Hawke, cried on national television when asked about the heroin addiction of his daughter. It was a natural outburst of personal anguish that would have been understood by all those close to people with problems of drug dependency. It was also a powerful symbol, first, of the extent to which illegal drug use had affected everyone in Australia, no matter what their position, and second, of the fear and anguish that such use aroused. It was a very private, very public act which expressed the importance of the issue in Australian society, and the emotionalism surrounding it.

The concrete result of Bob Hawke's tears was the Special Premiers'

Conference on Drugs held in April 1985, out of which emerged the National Campaign Against Drug Abuse (NCADA). Despite the hackneyed use of war-like metaphors, the informational materials produced by the NCADA have consistently dealt with both legal and illegal drugs equivalently. Further, the programme has led to increased funds for a variety of research, educational and community-based resources: to a considerable extent, it has acted upon the Premiers' recognition 'that drug abuse is a complex problem and that there are no simple or quick solutions'.[23] It would be remiss of me not to mention that a large proportion of the funding for my own research came from the NCADA.

None the less, the NCADA reflected the overall approach of the Labor Party in the 1980s. Despite a more sympathetic approach to users, the legal structure of drug policy was not re-evaluated. The Conference agreed that 'existing controls on cannabis are to be maintained', and

that it was essential that government efforts to combat drug trafficking and to prevent supplies of hard drugs coming into the country be intensified. Particular attention will be paid to those who control, direct and finance such activities.[24]

This commitment has been realised both in the allocation of Commonwealth funds to these purposes, and in legislation enacted by the Commonwealth relating to telephone interception, the confiscation of assets, the powers of the NCA, and so on. As in other jurisdictions around Australia, the Commonwealth government accompanied a more understanding approach to 'mere' users with increased severity against traffickers.

Dr Jekyll: Legislative Reform in South Australia 1984–1986

Labor and Liberal parties alike adopted dichotomous policies, savagely increasing some penalties and reducing others, but to a considerable extent both aspects served much the same purpose: containment. Criticism of the law-enforcement approach to the problems of drug use was quietened by the introduction of some reforms, while the growing—and popular—emphasis upon large-scale drug trafficking focused attention away from a general examination of the legal principles of prohibition and punishment. The structure of drug laws was thus shored up in two contrasting but interrelated ways. The result was a curious cocktail of tyranny and liberality, the exact mix of which varied from jurisidiction to jurisdiction. Two examples stand out as representing the extremes of drug policy in Australia. In isolation they seem inconsistent but they were merely clearer expositions of the two approaches struggling to co-exist. In South Australia, Dr Jekyll emerged victorious. In Queensland, Mr Hyde held sway.

The *Controlled Substances Act 1984*, introduced by the South Australian

Labor government of John Bannon, replaced and clarified the *Narcotic and Psychotropic Drugs Act 1934*, which had been described by South Australian Chief Justice, John Bray, as a 'repatched patchwork quilt'. It was a reform similar to that enacted in Victoria. New penalties were introduced for large-scale trafficking and forfeiture laws were expanded; the possession, use, or cultivation for personal use of a small quantity of cannabis, in contrast, was only to be subject to a $500 fine. While the Liberal opposition protested that this was 'the thin edge of the wedge', the amendment itself was in keeping with the trend in other jurisdictions. The South Australian Minister for Health, Dr John Cornwall, who at the June 1983 State convention of the Labor Party had led the debate on a resolution calling for the decriminalisation of marijuana and 'carried the day', was likewise at pains to acknowledge that 'the great majority of South Australians are not prepared to accept decriminalisation of marijuana'. 'This is a modest amendment only,' he said. 'I personally do not propose to take it any further at this time.'[25]

In other ways, however, the *Controlled Substances Act 1984* went significantly further than any other State legislation in reforming the drug-control system. A person charged with possession of a drug of dependence (other than cannabis), is referred under the Act to an assessment panel, which can ask them to enter into a written undertaking designed to help their treatment, education, rehabilitation, or addressed to 'any other matters [to] assist that person to overcome any personal problems that may tend to lead ... to the misuse of drugs'. In return, the assessment panel can stop the prosecution from proceeding. At the same time, the interests of the defendant are protected. The accused may refuse to be assessed or to give any undertaking and may choose to go to court instead; neither is it assumed that they are 'sick' and in need of treatment, but only that they may have 'personal problems'.[26] The withdrawal of an authoritarian legal system is not necessarily accompanied by authoritarian medical control.

Persons charged with a 'simple possession offence' were no longer expected to end up in court; on the contrary, they could *only* be charged with the express authorisation of the assessment panel whose priority was the welfare of the user and not the enforcement of the law. Recall that the illegality of possession and use was the basic principle upon which the whole edifice of drug control policy in Australia had been erected. Now it had virtually been sidelined. Yet the government was not prepare to reconsider the crimes of possession or use themselves, or the effect of the legal structure upon users or the drug trade in general. Rather, it attempted to avoid the consequences of legislative prohibition without amending the prohibition itself. The opposition protested that

where a breach of the law is alleged against an adult offender he should be dealt with by the ordinary courts of the land. To do otherwise is to erode the criminal justice system.

'We are dealing with criminal matters,' insisted another speaker.[27] For the

Liberal Party, then, the law was the law. But the government agreed: the law's meaning was undermined, but its words remained.

Despite his parliamentary statements, Dr Cornwall and other prominent members of the Labor Party, including the ex-Premier and patron of the National Organisation for the Reform of Marijuana Laws, Don Dunstan, had no intention of leaving the laws relating to cannabis as they stood.[28] This mainstream support for reform, coupled perhaps with the long-term influence of the report of the South Australian Royal Commission, enabled more radical changes to take place. Notwithstanding the Special Premiers' Conference statement in favour of cannabis prohibition, to which the Premier had consented, further reform was introduced in 1986. The Controlled Substances Act Amendment Bill proposed several amendments to the Act, including an increase in the fine payable by a person convicted of possession of over one hundred grams of cannabis for the purpose of sale, from $4000 to $50 000. Hidden in the Bill, however, was a new scheme for the 'expiation of simple cannabis offences'. Possession and cultivation of a small amount of cannabis, which previously attracted a maximum penalty of $500, could, under the proposed amendment, be 'expiated' by the payment of a fee of $50 or $150 (depending on the amount involved). As in the case of parking fines, the expiation fee, if paid, would not be dealt with by a court, would not constitute an admission of guilt and would not amount to a criminal conviction. It was a proposal for decriminalisation, however much the government tried to deny it.[29]

The Labor Party allowed a free vote on the Bill and in consequence, it was opposed by some members of the Labor Party as well as all the Liberal Members. Debate was lengthy and acrimonious. Following criticism that the Bill would have allowed the smoking of marijuana in a public place '[by] Paul McCartney, Boy George and other rock stars ... in front of 40 000 to 50 000 young South Australians' it was hastily redrawn, but attacks that Dr Cornwall characterised as 'carping, cavilling and negative' continued. All the old arguments were rehearsed: 'Anyone else,' said one speaker, 'who commits an offence ... has a black mark against his or her name'. The deputy leader of the opposition complained that it was 'the conformists who do *not* ... throw aside all the mores that have helped keep the community together, who pick up the tab for the social misfits'. Above all, cannabis use still symbolised, for many people, social non-conformity and legal disobedience.[30]

Essentially, debate on the clause illustrated two different attitudes to the validity and function of law. Dr Cornwall, for example, insisted 'we must never glibly believe that the legislative solution will solve all our problems'. For him, the fundamental point was that the prohibition of cannabis had failed. On the other hand, K.T. Griffin, who led the debate for the opposition, argued that legalisation would make marijuana use acceptable and that its prohibition had prevented many people from trying the drug because, as he said, 'there are a lot of persons who obey laws even though they do not accept that the law is a good law'.[31] To those opposed to the Bill, the health arguments against marijuana were conclusive; to its proponents, the question

was not about how people should behave, but how the law affected their behaviour. To the opposition, changing the law changed reality; to those in favour of the Bill, changing the law only acknowledged reality.

The Bill passed through the second reading despite passionate opposition and few signs of government support—only two government Members spoke in favour of the scheme in the Legislative Assembly, and Dr Cornwall alone in the Legislative Council. In the committee stage of the Bill's passage through the Legislative Assembly, the new expiation scheme, clause 8, was voted on separately, and four members of the Labor Party voted against it, including Lynn Arnold, the Minister for State Development and Technology (and future State Premier). In a moment of high drama, the Chairman of Committees, Mr Ferguson, announced the result of the vote:

There are 22 Ayes and 22 Noes. There being an equality of votes, I will give my casting vote for the Ayes.
Honourable members: Shame! Shame!
The Chairman: The question therefore passes in the affirmative.

The vote on the third reading was less close, many government members finding that although they opposed clause 8, they were not prepared to vote against the Bill as a whole. Showing tactical astuteness, the government had included several other unobjectionable amendments along with the expiation scheme: by twenty-four votes to eighteen, the Controlled Substances Act Amendment Bill was passed on 29 October 1986.[32]

A week later, the Liberal Party retaliated. The Controlled Substances Act Amendment Bill (No. 2), which they introduced, did one thing only: it repealed the expiation scheme. It was simply designed to force those members of the Labor Party who had refused to vote against the original Bill *as a whole* to take a definite stand. In a sniping spirit, and in an atmosphere of rowdy emotionalism, the vote on the second reading was taken. Again the vote was tied, twenty-one apiece, and the Speaker, John Trainer, was required to cast a deciding vote.

The Speaker: ... This measure being, in effect, the reconsideration of a question previously decided, and the Chair being free to exercise a personal conscience vote and to support the status quo, I cast my vote with the Noes. The question is not agreed to.

The Speaker therefore relied on the parliamentary convention that the presiding officer should not vote to change the law; it was a principle that the Chairman of Committees in debate on the previous Bill seemed to have overlooked. Still, the result stood and the Bill was defeated. Section 45a of the *Controlled Substances Act* remained on the books. The Labor government, not very convincingly, insisted that the expiation scheme did not amount to decriminalisation. Dr Cornwall argued that not just the sale but the possession of cannabis remained illegal; only the penalties had altered. But these

arguments fooled no one. If the expiation fee was paid, none of the consequences of illegality would follow: no conviction, no criminal record, no court appearance.[33] Legislation had been passed which significantly lessened the control exercised over the use of a drug or poison in an Australian jurisdiction.

The South Australian amendment was the most radical change to cannabis laws yet undertaken in Australia. It seemed a rejection of the 'illness' and 'vice' models of drug control as applied to cannabis. The *Single Convention*'s insistence that cannabis was 'particularly dangerous' was ignored, as it had been to a lesser extent in other jurisdictions. But the *Controlled Substances (Amendment) Act 1986* was not a rejection of prohibition. It was merely an extension of the ambivalent nature of drug legislation throughout Australia in the 1980s. Penalties for the manufacture, production, sale or supply of all drugs of dependence and prohibited substances, *including* cannabis, were substantially increased by the amendment. In South Australia, seizures of over 300 grams of heroin could result in a penalty of $500 000 and life imprisonment; in New South Wales and Victoria a similiar penalty only applied to amounts in excess of one kilogram. Dr Cornwall boasted that the Bill enacted 'penalties for trafficking and trading to the highest level in mainstream Australia'.[34]

The Bill carried to an extreme the distinction between users and sellers that applied in every jurisdiction. One speaker said the government was 'having a bit each way', 'punishing more severely the Mr Bigs ... but soften[ing] up considerably on the users.'[35] Yet this was exactly the process underway throughout Australia. Comprehensive reform of 'drug' laws or cannabis laws was not undertaken. It is often argued that cannabis is bad because smokers buy the drug from illegal sources and are therefore exposed to criminal drug dealers. On this reasoning, the *illegality* of cannabis acts as a 'stepping stone' to heroin, rather than the drug itself. But the *Controlled Substances (Amendment) Act* did not solve this problem. Penalties for the sale of cannabis were in fact increased. Marijuana smokers in South Australia must still mix with law-breakers and drug-dealers in order to obtain the drug; they are now protected from the law, but their environment remains the same.

Although Lynn Arnold feared that decriminalisation would 'move the frontier of debate' and open up the 'plausible arguments' concerning legalised heroin,[36] the opposite may be the case. The use of certain drugs, even of cannabis, remained illegal, and their special status and imagery in the public mind was undisturbed. Cannabis, moreover, was set up as a special case with the consequence that the parallels between the operation of cannabis laws and the workings of other drug laws are more likely to be ignored than explored. The Dr Jekyll approach taken in South Australia suggests how amelioratory legislation may take the pressure off any critical reappraisal of the fundamentals of drug policy in Australia.

Mr Hyde: Legislative Reform in Queensland 1986

At the same time as cannabis reform took place in South Australia, the arch-conservative National Party administration of Sir Joh Bjelke-Petersen in Queensland enacted the toughest drug legislation ever seen in Australia. Its law-and-order approach to drugs was both politically expedient and, as we have seen, a genuine expression of conservative values in which illegal drug use was hated for what it symbolised, and with whom it was associated. The *Liquor Acts and Other Acts Amendment Act 1985* (Qld) illustrated the extreme lengths to which this approach could be taken. It provided that a liquor licence would be forfeited if

the licensed premises have been the resort of prostitutes, drug dealers, sexual perverts or deviants, child molesters or of persons under the surveillance of the police.[37]

If publicans served 'drug dealers' or 'deviants' in their bars, they would lose their licences. Drug sellers, people whose sexuality was not 'normal' (including, presumably, homosexuals), people the police thought trouble-makers (for whatever reason), were not necessarily guilty of any criminal conduct—certainly not by their presence in a bar—but they were all to be hounded out of 'decent' society. Not just their illegal behaviour, but they themselves, were condemned.

These modern outlaws were not defined. Who is a 'pervert' or a 'deviant'? What is a 'drug' and when does a user 'deal'? When is a premises a 'resort'? These questions seemed so self-evident to the Queensland government as not to require definition. 'We' are normal—'they' are not. *We know who They are*, said the Act; 'their' difference was a mark of identification and a crime in itself. The *Liquor Acts and Other Acts Amendment Act 1985* demonstrated an obsession with conformity and obedience of which the government's hatred of illegal drug use was merely an aspect and a symptom.

The essential 'otherness' of drug users likewise led to the enactment of the *Drugs Misuse Act 1986* (Qld), introduced by the Minister for Police, Bill Gunn. The Queensland Department of Health had lost its power; drugs were now a police matter. Warrantless searches, internal and body cavity searches, the use of listening devices, wide-ranging provisions dealing with the forfeiture of property and the confiscation of assets: in these respects, the Act was thorough, but not substantially different from other jurisdictions.[38] The Act, however, went further. It established two schedules. Schedule 1 listed heroin, cocaine, lysergide (LSD), and phencyclidine. Schedule 2 included over 130 other drugs, including barbiturates, amphetamines, hallucinogens, opiates and cannabis.

Schedule 2 also included bufotenine, the name invented to describe the acrid distillation of *Bufo marinus*, the giant cane toad. Since its introduction into the cane-fields of Queensland earlier in the century, the cane toad has proven to be one of the great biological disasters to befall this continent. Poisonous, ravenous, and prolific, it advances inexorably across the continent, causing extensive damage to crops and threatening many native species with extinction. Apparently this menacing toad, which otherwise seems unstoppable, can be boiled up and drunk with hallucinogenic results; I've even heard of hardy northerners squeezing its poison into their beers. I'm not sure how much credence to give to these stories; actual evidence of this kind of 'buphoria' seems scant, and the practice, by all accounts, is too revolting to be worth the trouble. None the less, so determined was the government to prevent the use of legal substitutes to evade the prohibition of recreational drug use that bufotenine was quickly included in the Queensland drug schedule and in corresponding schedules in other jurisdictions.[39] From 4-Cyano-2-Dimethylamino-4,4-Diphenylbutane and tetrahydro-cannibinol on the one hand, to mushrooms and poisonous toads on the other, drug legislation continued to be updated. Once again the hydra was decapitated. The obsessive determination of the legislature to enforce the law has been matched only by human ingenuity and the infinite diversity of the natural world.

The story of the cane toad demonstrates in miniature the approach of the *Drugs Misuse Act*: the law was the law, and no attempt to circumvent it would be tolerated. The medical model was rejected and the law enforcement model endorsed with a vengeance. The effectiveness of the law was assumed, if only legislation was comprehensive enough and penalties harsh enough.

In addition to offences relating to supply, cultivation, possession and so on, the Act created a new offence of 'carr[ying] on the business of unlawfully trafficking in a dangerous drug'. The *business* of supply, then, was the new focus of the law. 'Trafficking', on the other hand, is nowhere defined. Just like 'sexual perverts and deviants', 'we' all know what a trafficker looks like.[40] The penalty for these offences varied depending on the schedule in which the drug was listed and the quantity involved. For the most serious offences a new penalty was created: in addition to a penalty of up to $500 000 and the application of forfeiture provisions, 'imprisonment with hard labour for life which cannot be mitigated or varied by a court'. This was not a maximum penalty: the judge had no choice but to impose this sentence, which applied to serious offences concerning schedule 1 drugs, including 'trafficking', supply of any quantity to a minor, and possession of either a 'commercial' quantity or a 'traffickable' quantity, unless the offender was a 'drug dependent person'. In fact, although I have used the terms 'commercial' and 'traffickable', these words were not used in the Act. The quantity which I have called 'commercial' was only one tenth the amount needed to constitute a commercial quantity in other jurisdictions.[41]

Any other conviction relating to schedule 1 drugs, including mere posses-

sion of heroin or cocaine, subjected the offender to a maximum (but not mandatory) penalty of life imprisonment and/or $500 000: in Victoria, the same offender could only receive up to one year's imprisonment and/or $3000, in New South Wales, two years' imprisonment and/or $2000, while in South Australia they would probably not be convicted at all. Even a parent who discovered heroin in their house and did not report their child to the police was liable to a penalty of up to fifteen years' imprisonment. And penalties relating to schedule 2 drugs, while not so extreme, were still harsher than those applying elsewhere in Australia. Possession or cultivation of a small quantity for personal use was not treated as a special case; neither was cannabis. All attracted penalties far in excess of those applicable in other jurisdictions.[42]

The treatment provisions of the Act also reflected its philosophy. The court could order the compulsory treatment of any offender who is 'a drug dependent person'. The implication behind the section was that all drug dependent persons needed to be treated, whether they agreed or not. It is hard to view the effect of these provisions, which authorised the indefinite hospitalisation of a person without their consent, against their will, as anything other than an insidious form of punishment. Furthermore, the *Health Act* (Qld), which the new Act replaced, had provided that the detention of a first offender for treatment was 'deemed not to be a conviction'. Somewhat like the approach taken in South Australia, the dependent user was in this way not labelled as criminal. The *Drugs Misuse Act* deleted the provision.[43] In South Australia, of course, no dependent user could be treated without their consent.

In debate on the Bill, government speakers saw drug use as a symptom of a general disrespect for authority. 'Law is a duty,' said Mr Cahill. 'Standards, once the object of attainment, are now despised. The reluctance to accept society is massive; and drug statistics tell their dreadful tale.'[44] It would be easy, then, to characterise the *Drugs Misuse Act* as the kind of ham-fisted extremism typical of a Queensland government that will long be remembered for its intolerance and its corruption. Or to see it as an anachronism, a last cry of defiance from the disciples of Harry Anslinger. But this would only be part of the story.

Those who opposed the Bill did not object to its severity outright. The Liberal Party, in opposition at the time, supported the thrust of the Bill with little hesitation. Liberal leader Angus Innes said:

it is worth a try to throw the book at offenders in an attempt to strike terror into the hearts of the little people because, if they are knocked out of the system, the Mr Bigs are exposed ...

Although he thought that the Bill was 'something radically different', the government's approach was in keeping with the trend around Australia. The overwhelming concern with large-scale trafficking made the enactment of any laws, no matter how extreme, acceptable.[45]

Terry Mackenroth, leading the debate for the Labor Party, also agreed 'with the government's stated intent ... to deal with the Mr Bigs of the drug trade', and merely charged that the Nationals were not willing 'to go all out to stop this insidious drug trade'. So powerful had rhetoric about 'Mr Big' and organised crime become that the Labor Party, although it expressed some reservations, supported the Bill through the second-reading stage. Again, in relation to the penalty of mandatory life imprisonment introduced by the government for 'trafficking' offences, all three parties engaged in competition to see who was toughest. The Labor Party argued that a 'life sentence' was normally paroled after about twelve years, and proposed instead a penalty of twenty-five years. The Liberal Party favoured not only mandatory life imprisonment, but a mandatory non-parole period set by the court. All were keen to prove their determination to 'get the big boys'.[46]

The severity of the *Drugs Misuse Act* was supported in large measure by opposition parties because it was extreme, but not abnormal. It was part of the Australia-wide focus on the business of trafficking. Mr Big was the new image of evil in Australian society, and in his name anything could be justified. To voice doubt, even in the face of laws as brutal as those enacted in Queensland, was a grave political risk. The difference was that in other jurisdictions severity was enforced selectively and 'mere users' treated more gently. Users and traffickers were distinguished. Throughout Australia the popular aspects of drug policy, with its focus on cardboard cut-out 'Mr Bigs', garnered general support for the continuation of law-enforcement strategies, while ameliatory policies softened the wounds inflicted on those who seemed unfortunately, unaccountably, to be caught in the crossfire. In South Australia in particular, amelioration softened the implications of prohibition without questioning its fundamentals. In Queensland, on the other hand, there was no such subtlety. The *Drugs Misuse Act* was an extreme implementation of Australian drug policy. But it was a caricature, not an aberration. It epitomised, in exaggerated fashion, one of the two tactics by which criticism of drug policy was contained and diverted.

CONCLUSION:

VOICES IN THE WILDERNESS?

The Web of the Law

From Mr Sin to Mr Big, the history of Australian drug laws has seen the interplay of a variety of complex forces. History is a process, not a moment; over the past one hundred years, many overlapping strands and themes have woven together, coming to prominence and fading from the scene. The fear of drugs has grown from a moral concern about use, to a medical concern about addiction, to an economic and political concern about 'the drug trade'. Drug users themselves have variously been pictured as evil fiends to be outlawed, as sick and pitiable slaves to be 'treated', and as insignificant side issues. The crime of possession has moved from a daring innovation, to a crucial orthodoxy, to an unimportant one. And the main focus of political intervention has also changed, from opium smoking, to cocaine sniffing, to marijuana smoking and the injection of heroin.

The language of the law has changed, too. 'Opium' laws became 'dangerous drug' laws, which became 'narcotics', which became 'drugs of dependence'. Even in those few words, we are reminded of whole histories: fear of the Chinese, the influence of the United States, and concern with addiction.

The vast legislative framework which has developed has reflected these shifting priorities and images. But drug laws, while mirroring our view of the powerless, have been etched by the powerful. And the location of power has itself changed many times in the past one hundred years. Drug laws were first enunciated by White Australians and then in the voice of the medical profession; medical hegemony over drugs was itself gradually undermined by bureaucratisation; while over the last thirty years bureaucratic influence has in turn been weakened by politics. The international system of drug control has been a parallel and counter-balancing authority to these domestic trends, reaching its zenith in the period of bureaucratic dominance. In some ways it has declined in importance since then, although the patterns of thought it etched deep in the Australian psyche have not weakened with time.

Accompanying these ebbs and flows have been many lesser currents that have, none the less, left their own marks on specific laws, jurisdictions, and times: the decline of pharmacy and of patent medicines, the expansion and contraction of power of the Commonwealth Department of Customs, the changing face of health bureaucracies, Australia's changing relationship to the Mother Country and Uncle Sam, the steady expansion in the number and range of controlled drugs, and the changing status of cannabis from novelty item to imported mythology to home-grown crisis. The balance of power between State and Commonwealth governments, police and health authorities, has been another important sub-theme; likewise we may recall the breakdown of the long-standing political consensus on drugs, and the development, in the last couple of decades, of a new consensus based on the principles of meta-law.

In these ways, there has not been a single 'history' of 'drug' laws in Australia. Many shifting factors have acted together to get us where we are

today. In this book I have discussed some of these, although I am sure I have ignored or failed to discover many more. Each factor has been subject to its own dynamics, and all have interacted in a complex and unpredictable fashion. History is not a line: it is a web in four dimensions.

Nevertheless, certain patterns have emerged that have changed surprisingly little since the opium prohibition laws. The flexibility and tolerance with which 'drug' use was viewed in the 1800s has gone: the division between 'legal' and 'illegal', 'medical' and 'non-medical' use is now so entrenched that the phrase 'drug abuse' is frequently used to mean *only* illegal non-medical use—and *any* illegal non-medical use. While the distinction between illegal 'drugs' and other substances has grown more profound, fear over their use remains, out of all proportion to the actual harm they cause. This fear, which has led so many people to describe drug use as 'the wrath of Satan', a 'cancer', or as 'undermining the very fabric of society', has not abated. Indeed, if anything, the current focus on organised crime has only exacerbated the atmosphere of crisis which has been whipped up so often in the past century.

More than this, however, attitudes to both 'drugs' and 'law' have shown a sometimes striking resilience over the years. From opium smoking to cannabis smoking, the condemnation of a particular drug use has concealed other concerns: from Mr Sin to Mr Big, we have outlawed phantoms and demons. Drug laws have developed out of prejudice, ignorance, and fear; from inertia at home and subservience abroad; through the interplay of professional, bureaucratic, political and international rivalries. The legal and social bifurcation that has developed between some drugs, the use of which is restricted or prohibited and censured, and others, equally harmful but more freely available, has not derived from their medical or chemical qualities. Drug laws have had precious little to do with drugs or health.

Even more consistently, the construction of drug laws has evinced an unbending attitude towards the legal system itself. Politicians, bureaucrats and many others have all assumed that the law is worthy of preservation because it is the law. The legal system has been buttressed by ever more complex provisions and fearsome penalties, each building upon and presupposing the validity of those that went before. The steady accretion of drug controls in the 1920s, the steady expansion of the number of drugs under control in the 1950s, and the steady escalation of penalties in the 1970s, all bear testimony to this process.

At the beginning of the twentieth century, science and law promised to usher in an age of certainty and rationality. The disciples of Newton conceived of the universe as a clockwork robot whose behaviour was orderly and predictable. But science has shattered its own illusions. The theories of relativity proved that everything depends on your point of view. Quantum mechanics recognised that the old rules simply do not always apply. Now chaos theory declares that disorder, far from being an aberration, is part of the natural state of the universe. In our attitudes to law as to the rest of our lives, however, the desire for certainty has not abated. We continue to

assume, on the one hand, that laws develop logically, for just and apparent purposes, and, on the other, that they are capable of effectively achieving the goals set for them. The drug-control system has demonstrated this faith and these assumptions over and over again, accompanied by a steadfast refusal to analyse the real purpose or effects of the legislative structure. Notions of relativity, uncertainty, and chaos have not tainted it with doubt.

The legislative structure which has developed out of these patterns, some fluid, some static, has become so vast as to seem almost immovable. During 1991 I was involved, to a minor extent, with the preparation of a feasibility study which considered the possibility of making opiates legally available in the Australian Capital Territory to some users on a trial basis. Perhaps heroin; perhaps only to drug dependent persons; perhaps only as an experiment. Hardly a radical change, yet immediately I was struck by the legal obstacles to such a move. Australia's treaty obligations branded heroin a 'particularly dangerous' drug and expected parties to absolutely prohibit its possession. The international community likewise vigorously opposed any undermining of the prohibitionist model. The importation of heroin is absolutely prohibited under Commonwealth law; even if it were not, it could not be imported without the Commonwealth government notifying the International Narcotic Control Board (INCB) of a change to Australia's 'estimates', which would be unlikely to be viewed with favour.[1]

Neither could heroin be legally manufactured in most jurisdictions. In Victoria, provisions do exist for the legal manufacture of heroin upon the granting, by the Minister, of a special licence. In the early 1980s, Australia's Health Ministers decided to allow the legal use of heroin in the treatment of terminal illness and plans were made for its manufacture by a company in Victoria. But the plan did not proceed and no licence was ever issued. Even if the Australian Capital Territory could come to an agreement with the Victorian government, once the cargo crossed into New South Wales, where heroin is a 'prohibited drug', its transportation would constitute illegal possession, and probably illegal supply subject to a penalty of up to fifteen years' imprisonment. And what of the law in the Australian Capital Territory, where provision is made for the supply of methadone under prescription, but heroin itself is a 'prohibited substance' that cannot be manufactured, supplied or possessed except for limited 'research' or 'educational' purposes?[2] A web is made of many strands, but they knit together with awesome strength.

Clearing the Cobwebs

It is easy to despair about the possibility of any change, or even any rational debate about the purposes and effects of drug policy. But, as we have seen, things do change, albeit slowly. The approach to drug 'abuse' taken by the Queensland National Party government has proved too extreme and politically partisan to survive the electoral defeat of the government. In the

complete rewriting of the *Liquor Act* (Qld), completed in 1992, the infamous provision relating to 'drug traffickers, sexual perverts or deviants, child molesters' and so on has been eliminated, replaced by far more general provisions dealing with the cancellation of liquor licences. The *Drugs Misuse Act* (Qld)—although it still includes some of the stiffest penalties in Australia, and still fails to provide a lesser maximum penalty for the possession or sale of cannabis—no longer requires judges to impose life sentences for some offences. The *Drugs Misuse Act Amendment Act 1990* passed by the Labor government of Wayne Goss, while keeping the structure of the Act unchanged, reduces the relevant penalties from maximum or mandatory life imprisonment, to maximum penalties from fifteen to twenty-five years depending on the offence.[3]

Meanwhile, in 1992 the Australian Capital Territory became the second Australian jurisdiction to decriminalise the possession or cultivation of a small quantity of cannabis (less than twenty-five grams or five plants) with the passage of a Bill introduced by Independent MLA, Michael Moore. Although the Bill in its final form imposes greater penalties ($100) for lesser quantities (twenty-five grams as opposed to up to one hundred grams) than those originally introduced, and the police in the Australian Capital Territory have long appeared to turn a blind eye to minor cannabis offences, the legislative change is still significant.[4] We might interpret this measure as a continuation of the trend begun in the Australian Capital Territory in 1975 and South Australia in 1986, or as an aberration, or as the start of a radical new direction in drug policy. One thing is clear: change continues to take place.

The last few years have also seen a significant increase in general criticism of Australia's drug-control system. 'Heroin: Why don't we just legalise it?', asked the *Bulletin* in a 1988 issue, the cover of which blared 'Can we afford not to say YES to heroin', while a century earlier it had seen opium as a tentacle of the 'Mongolian octopus'. The National Secretary of the Australian Federal Police Association, the retired Victorian Assistant Police Commissioner, the Law Council of New South Wales, and the New South Wales Bar Association have all called for sweeping alterations to the current prohibitionist model, including among their suggestions the legal provision of heroin to addicts and a complete rethinking of the role of the criminal law in personal drug use. The latest parliamentary report to deal with the subject, *Drugs, Crime and Society*, issued by the Parliamentary Joint Committee on the National Crime Authority in 1989, likewise trenchantly criticised the current approach of governments, condemned governments' preoccupation with the enactment of harsh penalties and with measures designed to suppress the *supply* of illegal drugs, and emphasised instead the costs of prohibition to drugs users, to the court system, and to society. The report concluded without dissent that Australia's policy of prohibition has in fact prevented the development of any effective controls on either the sale or use of illegal drugs.[5] Senator Peter Baume, amongst others, has spoken with more and more conviction as the years have passed. In one of his last parliamentary speeches on the subject, before retiring to take up an appointment as

Professor of Community Medicine at the University of New South Wales, he said:

Our strategies seek to prevent the production of certain designated illegal substances, and fail to do so; they seek to prevent the importation of substances, and fail to do so; they seek to prevent the distribution of substances, and fail to do so; they seek to prevent the sale and use of substances, and fail to do so.[6]

The pronouncements of the international community do not carry the weight they used to, either. Australia's independence in this respect has been growing ever since drugs began to 'matter'. In general it has not led to any conflict between domestic and international policies, but there have been exceptions. Building on the pioneering work of J.G. Starke and CSIRO, Australia has been successfully producing morphine in Tasmania, by the poppy-straw method, for local and international sale, since 1971. By 1983 Australia had become one of the four major world suppliers of raw materials for the production of opiates, producing the equivalent of thirty-nine tonnes of morphine annually—more poppy-straw concentrate than that produced by the rest of the world combined. Morphine produced by the poppy-straw method is not subject to detailed international supervision, and although the INCB and the Economic and Social Council of the UN have frequently urged 'new producers' to limit their production 'to meet mainly their domestic requirements' in the face of a 'vast [world] oversupply of opiates', the Commonwealth government has stood firm. In 1985 it specifically rejected the INCB's position and declared the Australian government's determination to continue to compete aggressively in the world market.[7]

No opposition to the power and authority of the UN, however, has been as public as that prompted by the adoption at a UN conference of the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.* The Convention emphasised the importance of law enforcement strategies in the war against Mr Big. It contained provisions relating to the commission of offences by 'an organised criminal group', to the confiscation of assets and to international co-operation concerning search, seizure, extradition and so on. While not radically changing international law, it reflected the new Conventional wisdom that the 'drug problem' was about the 'links between illicit traffic and other related organised criminal activities'.[8]

The Convention has been severely criticised. Retired Federal Court Judge, Russell Fox, QC, in particular, has lobbied intensively against Australia's ratification of the treaty, arguing that it would further entrench a 'prohibitionist and penal' approach and 'put our policies on important matters beyond recall'. In response, the government has been forced to defend the treaty not by arguing the merits of law enforcement but by denying that ratification would commit Australia to any specific legal or policy strategy at all. So powerful has opposition been, however, that the Convention has not yet been ratified.[9]

Drug orthodoxy, therefore, is not now unquestioned. In part, this has been the result of the growth of organised crime and drug trafficking, which all the majesty of the law has proved manifestly incapable of preventing. The very fact that 'the drug problem' has become, as we have seen, a question of economics and power—rather than of morality—has, perhaps, allowed more radical options to be considered. On the one hand, organised crime is seen to threaten the integrity of the whole of the legal and political system, and so the stakes are high enough to countenance radical reforms. On the other hand, the removal of drug use itself from the centre of public concern may mean that legalisation or decriminalisation are no longer the impossible options they once were. The focus on 'the drug problem' as an economic one, which served to constrain drug reform in the 1980s, may yet allow an accelerated pace of reform in the years to come.

The spread of AIDS among users of illegal intravenous drugs has given a further impetus to demands for radical change. Illegality breeds secrecy, secrecy causes uncleanliness, and dirty needles kill. The personal costs of the prohibition of heroin to the health of drug users are now more apparent than ever, and many people who would not otherwise have done so have found themselves advocating a variety of radical solutions including the legal supply of heroin to addicts, or at least the legal supply of clean needles. Faced with a genuine human crisis rather than merely a rhetorical one, moreover, Commonwealth and State government policies have been notable for their restraint and practicality.[10] With this new emphasis on practical solutions directed to the health of users, the protection of the integrity of the legal structure may be becoming less important. Once something is defined as a health problem and not a legal one, the framework of the legal system no longer controls how solutions are formulated. The condition of illegality in which users currently consume heroin may be changing from a fundamental and unalterable principle, to merely one variable in an analysis directed simply at the minimisation of harm. With this pragmatic approach in place, anything is possible.

There are some indications that these attitudes may already be having an effect. In the Australian Capital Territory, for example, it is now specifically provided that the supply of syringes for the administration of a drug of dependence or prohibited substance is not a crime if it is done by an approved health worker and 'the supply of the syringe might assist in preventing the spread of disease'.[11] A similar provision can be found even in the Queensland legislation. The AIDS virus, then, is leading to legislation which permits previously illegal acts in the cause of advancing the health of users. Possession and use still remain illegal, but their meaning has been still further undermined.

These dynamics are only now working themselves out; the extent and direction of change will not be apparent for some time. In the meantime, I am not a seer or a prophet, but a lawyer and a historian. I do not wish to engage in prediction. At the same time, in my discussion of the past, I have tried not to let my own opinions about drug policy intrude too much into

my historical analysis. Of course, neutrality is a fiction, and my own values have been clearly apparent. But anyone interested in options for drug control policies can and should turn to any number of books written by people far more qualified than I. One thing is apparent. 'Drugs' is a subject which people approach with many erroneous preconceptions, and a little knowledge can change people's opinions profoundly. Both Peter Baume and Peter Cleeland, chairmen of influential parliamentary committees on the subject, have stressed to me how much their thinking began to change when they first started to read and to listen.[12]

The mythology, preconceptions, and rhetorical excess surrounding 'drugs' in Australia did not emerge overnight. They are a product of our past. History, then, is a vital step in clearing our minds and starting afresh. No debate on drug policy can proceed rationally until we know where we have come from and why. I have hoped to show why and how laws have grown in this country, and I have dared to criticise some of the assumptions that people make—that laws have developed with specific and rational purposes in mind, that the reason for a law's enactment is the same thing as the reasons given for it, and that laws are effective tools in changing people's behaviour. Of course, laws are not without effect: clearly, they have influenced the way in which generations of policy-makers have approached the problems of drug use. Laws have operated most powerfully as influences on how we see the world and as limits on what we think is possible. They have not been nearly so effective as blunt instruments to make people do as they are told. We must always be conscious of the origin and the limits of laws. There are real problems associated with the use of any mind-altering substance (illegal or not): not legal problems, just problems. Poverty, sickness, alienation, despair, powerlessness. Drug use is only a symptom and an aspect of these problems. From Mr Sin to Mr Big, laws seem to have been far more effective in concealing them than in solving them.

NOTES

Abbreviations

AA	Australian Archives (ACT)
AONSW	Archive Office of New South Wales
ARCID	Australian Royal Commission of Inquiry into Drugs (Hon. Justice Williams, Commissioner), *Report*, AGPS, Canberra: 1980
CPD	*Commonwealth Parliamentary Debates*
NSWPD	*New South Wales Parliamentary Debates*
NSWRC	Royal Commission into Drug Trafficking (Justice Woodward, Commissioner), *Report*, Joint Volumes of Papers, 2nd Session, 1979–80, vol. III and 3rd Session 1980–81, vol. II, Sydney: 1980–81
NSWRCC	NSW Legislative Assembly, Royal Commission on Alleged Chinese Gambling and Immorality (Mayor Manning, Chairman), Government Printer, Sydney: 1892
PROV	Public Record Office of Victoria
QSA	Queensland State Archives
QPD	*Queensland Parliamentary Debates*
SAPD	*South Australian Parliamentary Debates*
SARC	Royal Commission into the Non-Medical Use of Drugs (Prof. Ronald Sackville, Chairman), Government Printer, Adelaide: 1978–79
SMH	*Sydney Morning Herald*
VPD	*Victorian Parliamentary Debates*

Introduction: Image and Usage

1 Marcus Clarke, 'Cannabis Indica', *Colonial Monthly* 1 (new series) (1868): 454–68, 454.

2 Thomas De Quincey, *Confessions of an English Opium Eater*, London: 1821.

3 *Ibid.*, 455, 458–9, 460.

4 See Alethea Hayter, *Opium and the Romantic Imagination*, London: 1968, esp.19–26 and 67–81.

5 J. Fordel Henderson, *The Opium Slave and Other Verses*, Brisbane: 1913, 3–6.

6 Diacetylmorphine was originally spelt 'heroine', although over time the final 'e' has been dropped. I will, except when quoting directly from other sources, stick

to the modern version.

7 Virginia Berridge and Griffith Edwards, *Opium and the People*, London: 1981, 30–52. See also Terry Parsinnen, *Secret Passions, Secret Remedies*, Philadelphia: 1983; Terry Parsinnen, 'Opium and the People', *Medical History* 26 (1982): 458–62; Virginia Berridge, 'Secret Passions, Secret Remedies...', *Medical History* 29 (1985): 210–17. See also Select Committee on Sale of Poisons Bill, *Report with Proceedings, Minutes of Evidence and Index*: 1857 (294 Session II), Vol. XII in *British Parliamentary Papers, Health—Food and Drugs 2*, Shannon: 1969, 102.

8 L. Kong Meng, C.H. Cheong, Louis Ah Mouy (eds), *The Chinese Question in Australia*, Melbourne: 1879, 14.

9 *Bulletin*, Sydney: 1882.

10 *Age*, Melbourne: 20 April 1858, 4; *Bulletin*: 6 July 1895, 27; *Intercolonial Medical Journal of Australasia* (1897): 327. See generally T.S. Pensabene, *The Rise of the Medical Practitioner in Victoria*, Canberra: 1980; Evan Willis, *Medical Dominance*, Sydney: 1983.

11 See for example debate on the Medical Practitioners Bill (Vic.), in *Victorian Hansard, Session 1857–8, Vol. 3*, 490.

12 Pensabene, 7, 6–15.

13 *Age*: 2 October 1876, 2.

14 *Illustrated Sydney News*, Sydney: 31 October 1868, 79.

15 *Pharmacy Act 1876* (Vic.), 40 Vic. No. 558, ss. 5 & 6; *Sale and Use of Poisons Act 1876* (NSW), 40 Vic. No. 9, s. 9. In New South Wales, the Board was not composed of chemists only until 1897 when the position was brought into line with that of Victoria: *Pharmacy Act 1897* (NSW), 61 Vic. No. 7, ss. 1 & 2. (Although the way in which Acts of Parliament are cited varies slightly between jurisdictions, and over time, I have, for the sake of clarity, cited all Acts consistently according to AGPS recommended style.)

16 Pensabene, 126 and *passim* 121–32. See also Gregory Haines, *The Grains and Threepenn'orth of Pharmacy*, Kilmore: 1976, esp. 58–63; but, for a contrary view, see *A Centennial History of the Pharmaceutical Society of Queensland* [no details]: 1980, 2.

17 Drs Wilson, Brodie, Webster and Marshall-Hall, and Prof. A.S. Taylor in Select Committee on Pharmacy Bill, *Report with Minutes of Evidence and Index*: 1852 (387), Vol. XIII in *British Parliamentary Papers, Health—Food and Drugs 1 (1852–55)*, Shannon: 1969, 13, 45, 156, 145 and *passim*. See also Select Committee on the Sale of Poisons Bill in *British Parliamentary Papers, Health—Food and Drugs 2*; and Select Committee on Chemists and Druggists Bill, *Special Report with Proceedings, Minutes of Evidence and Appendix*: 1865 (381), Vol. XII in *ibid.*

18 E.W. Cole, *The Pound Pamphlet Word for Word*, Melbourne: [no date], 106–11.

19 Mr Carter in *VPD, Session 1898, Vol. 90*, 2989.

20 David Courtwright, *Dark Paradise*, Cambridge, Mass.: 1982, 1–8, 36–48. See also Berridge & Edwards and Parsinnen; Robert Solomon & Michael Green, 'The First Century: The History of Non-Medical Opiate Use and Control Policies in Canada', *University of Western Ontario Law Review* 20 (1982): 307.

21 *Bulletin*: 28 December 1895, 28.

22 *Age*: 11 March 1892, 4.

23 Mr Carter in *VPD, Session 1898, Vol. 90*, 2989.

24 Mitchell Library, *Index to the Bulletin 1880–1895, 1896–1898, 1880–1901*, Sydney; Mitchell Library, *Index for 'Age' 1892–1899*, Sydney; *Bulletin*, Sydney: 1880–1901; *Age*, Melbourne: 1892–1899 esp. 27 October 1893.

25 *Sale and Use of Poisons Act 1876* (Vic.), 40 Vic. No. 559, ss. 3, 4, 6 & 13; *Sale and Use of Poisons Act 1876* (NSW), 40 Vic. No. 9, ss. 7, 11, 18.

26 *Sale and Use of Poisons Act 1876* (Vic.), ss. 5 & 8; *Sale and Use of Poisons Act 1876* (NSW), ss. 2 & 3.

27 *Ibid.*, Preamble; see also Mr Cumming, MLA, in *VPD, Session 1876, Vol. 25*, 1810.

28 Evidence of J. Abrahams, S.J. Birch, Prof. A.S. Taylor in Select Committee on the Sale of Poisons Bill in *British Parliamentary Papers, Health—Food and Drugs* 2, 44, 64, 102, 44–8.

29 Lord de Malahide, Lord Wensleydale and Herapath in *ibid.*, 102.

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> 18. For the purposes of this Part, 'opium' includes any preparation thereof in a form capable of being used for the purposes of smoking.
> 19. (1) No person shall—
> (a) unless the holder of a certificate to deal in poisons, issued under the provisions of the Poisons Act 1902, or any Act amending the same, sell or have in his possession, opium;
> (b) smoke opium;
> (c) keep open, manage, or assist in keeping open or managing, any house, room, or place used for the purpose of opium smoking.
> (d) being the owner or lessee of any house, room, or place, knowingly permit such house, room or place to be used for the purpose of opium smoking.

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32 See letter from the Prime Minister, William Hughes, 8 February 1923; Director-General of Public Health, 14 March 1923; in AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Acts) Amendment 1928–34, 5/5415; Captain Chaffey in *NSWPD, Session 1933–1934, 23 Geo. V Ser. 2 Vol. 138.*

33 Comments to External Affairs Department from New South Wales government, 25 February 1927 & [no date], Western Australian government, 24 February 1927, Victorian government, 31 March 1927, in AA : CA 18; CRS A981 Correspondence Files 1927–42, League of Nations Opium 25; AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Act) Amendments 1928–34, 5/5415.

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Extension of Control to New Drugs 1928–1949.

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49 Dr Cook, 22 November 1935; E. Abbott [no date]; in *ibid.*

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1 Mr Watt and Mr Mackinnon in *VPD, Session 1904 Vol. 108*, 1889, 1890.

2 AONSW, Colonial Secretary Special Bundle: Prayers for Rain 4/814.2.

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15 See also Alfred McCoy, *Drug Traffic*, Sydney: 1980, 74–92.

16 *Sale and Use of Poisons Act 1876* (Vic.), 40 Vic. No. 559, ss. 4 & 13; *Sale and Use of Poisons Act 1876* (NSW), 40 Vic. No. 9, ss. 11 & 7; *Poisons Act 1902* (NSW), 2 Edw. VII No. 65, s. 5. In Victoria, the original reference to 'patent or proprietary medicines' was altered in 1915 to 'patent medicines', a narrower class: *Poisons Act 1915* (Vic.), 6 Geo. V No. 2707, s. 16.

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19 Royal Commission on Uniform Standards for Foods and Drugs in the States of the Commonwealth of Australia, 41–3; *Bingeham v. Stevens* in PROV, VA 1349 Pharmacy Board of Victoria 1876+, VPRS 1867 Legal Opinions 1877–1959.

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28 President of the Pharmaceutical Society, McKimm, 30 March 1925, in AONSW, Chief Secretary Special Bundle: Police Offences [Drug Acts] Amendments 1928–34, 5/5414. See 'History of "drugs" legislation in NSW', in AONSW, Chief Secretary Special Bundle: Police Offences Amendment (Drugs) Bill and Related Papers 1924–34, 3/2376.2.

29 Questions on notice by Gregory McGirr to Oakes, answered 18 December 1923, in AONSW, Chief Secretary Special Bundle, Police Offences [Drug Acts] Amendments, 1928–34, 5/5415.

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31 Memorandum, 3 February 1927, in AONSW, Chief Secretary Special Bundle: Police Offences Amendments 1928–34, 5/5413.

32 *Ibid.*, Under-Secretary of the Colonial Secretary's Department, E. Harkness [no date] and 13 November 1929, in AONSW, Chief Secretary Special Bundle: Police Offences [Drug Acts] Amendments 1928–34, 5/5414; see generally the report by Wurth & Anderson in *ibid.*

33 Report by Wickham & Thompson to Superintendent, Criminal Investigation Branch, 24 August 1931; President of the Pharmacy Board, McKimm, to Colonial Secretary, 14 August 1931; in AONSW, Chief Secretary Special Bundle: Police Offences Amendments 1928–34, 5/5413.

34 19 October 1926, in AONSW, Chief Secretary Special Bundle: Police Offences Amendment (Drugs) Bill and Related Papers 1924–34, 3/2376.2; AONSW, Chief Secretary Special Bundle: Police Offences Amendments 1928–34, 5/5413.

35 Under-Secretary Harkness, 28 February 1930; Inquiry by McKimm, April–May 1931; in *ibid.*

36 Inquiry by Mr Gates, SM, 28 July 1931; McKimm to Colonial Secretary's

Department, 14 August 1931; Report by Detective Sergeants Wickham and Thompson, 24 August 1931; in *ibid.*

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41 See Haines, 97–145.

42 Mr Justice Browne, 'Report of the Industrial Commission of New South Wales on ... Pharmacy Chain Stores', in *NSW Parliamentary Papers, 1938–40, Vol. VIII*, 513 & 519.

5 *Illness and Vice*

1 Alfred McCoy, *Drug Traffic*, Sydney: 1980, 117–40.

2 *Herald*, Melbourne: 16 March 1923.

3 Ernest McTiernan in *NSWPD, Session 1923, 14 Geo. V, 2nd Ser. Vol. 92*, 1264–5; *Poisons Act 1925* (Vic.), 16 Geo. V No. 3401, s. 5; Dr Argyle in *VPD, Session 1925, Vol. 169*, 115.

4 *Argus*, Melbourne: 30 May 1923, 9; 21 July 1923, 25; 6 March 1925, 15; Dr Argyle in *VPD, Session 1925, Vol. 169*, 115.

5 Press release by Dr Dick, 14 April 1923, in AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Acts) Amendment 1928–34, 5/5415.

6 AA: CA 7 Department of External Affairs (II); CRS A981 Correspondence Files 1927–42, League of Nations 46 Old Pt. 1.

7 Inspector Mackay, 23 June 1926, in AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Acts) Ammendment 1928–34, 5/5415.

8 Naturally I have kept the details of the whereabouts of this file vague. I hope its contents will remain there for another sixty years.

9 Inspector Mackay, 16 June 1926, in AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Acts) Amendment 1928–34, 5/5415.

10 McCoy, 117–40; Carlo Lazzarini and Mr Arkins in *NSWPD, 2nd Session 1926, 17 Geo. V, 2nd Ser. Vol. 108*, 1144, 1150 and *passim*.

11 *SMH*: 8 August, 1929, 13; 11 May 1928, 6; 26 September 1928, 12; 19 June 1929; 1 May 1930, 8. See also 19 January 1929, 22; 8 August 1929,13; 30 November 1929, 19; 2 August 1930, 10.

12 *Ibid.*: 14 April 1928, 18.

13 *Sunday Times*, Sydney: 1 March 1926.

14 See, for example, *Inebriates Act 1912* (NSW), 3 Geo. V, No. 24.

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16 Dangerous Drugs Regulations 1922 (Vic.), *Gazette No. 102*, 6 September 1922, 2410–12, rr. 3, 4 & 10; *Poisons Act 1925* (Vic.), 16 Geo. V No. 3401, s. 6; Dr Argyle in *VPD, Session 1925*, Vol. 169, 115; Dangerous Drugs Regulations 1930 (Vic.), *Gazette No. 12*, 31 January 1930, 413 *et seq.*, r.6.

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18 *SMH*: 10 April 1928, 12: 8 May 1928; *Poisons Act 1920* (Vic.), 11 Geo. V No. 3103, s. 12; *Poisons Act 1927* (Vic.), 18 Geo. V No. 3541, s. 27.

19 Captain Chaffey in *NSWPD, Session 1934–5, 24 Geo. V. Ser. 2 Vol. 141*, 2906–10. See also *Police Offences Amendment (Drugs) Act 1934* (NSW), No. 16, 1934, s. 2(2)(d).

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21 *SMH*: 12 May 1930, 12; see also 13 May 1930, 8; 23 March 1935, 12*f*.

22 First supplement to the *Oxford English Dictionary*, Oxford: 1933, 309; William Short, in Royal Commission on Secret Drugs, Cures & Foods (Octavius Beale, Commissioner), *Report, Vol. 1*, Melbourne: 1907, 234.

23 Minute, 29 January 1906 and *Comptroller-General of Prisons Report 1905*, in AONSW, Attorney-General Special Bundle: Working of, And Amendments to, Inebriates Act 5/7751.1; *Inebriates Act 1912* (NSW), 3 Geo. V, No. 24; Mr Prendergast in *VPD, Session 1904, Vol. 108*, 1764.

24 Earle Rowell, *Battling the Wolves of Society: The Narcotics Evil*, Warbuton, Vic.: 1929, 9–23 (see also 41), 29–32, 38, 3. This book was originally written and published in the United States, but its printing in Australia showed its significance.

25 Eliot Friedson, *Profession of Medicine*, New York: 1970, 185–6, 205–26; Thomas Szasz, *The Myth of Mental Illness*, New York: 1961, 44–5; See also, for example, Paul Wilson & John Braithwaite (eds), *Two Faces of Deviance*, St Lucia: 1978; Ivan Illich, *Medical Nemesis*, London: 1974; Susan Sontag, *Illness as Metaphor*, New York: 1988.

26 Messrs Lazzarini, Arkins & McGirr, in *NSWPD, 2nd Session 1926, 17 Geo. V, Ser. 2 Vol. 108*, 1144–6, 1148–50.

27 Police Offences Amendment (Drugs) Act 1927, Regulations (NSW), *Supplement to Government Gazette No. 120*, 30 August 1927, r.22; Dangerous Drugs Regulations 1930 (Vic.), *Gazette No. 12*, 413 *et seq.*, r.16. A less clear regulation aimed at the same problem was to be found in Dangerous Drugs Regulations 1922 (Vic.), r. 6(a).

28 *Poisons and Dangerous Drugs Ordinance 1933* (FCT).

29 Charlie Woodward, *Peeps into Gaols, Police Courts, Opium Dens*, Sydney: 1933, 35.

30 Rowell, 49 & 94.

31 *VPD, Session 1925, Vol. 169, 506; Oxford English Dictionary and Supplement to*

the Oxford English Dictionary, Vol. 1, Oxford: 1980, entries for 'Fiend'. The word 'fiend' in this context is said to be 'applied with jocular hyperbole to a person or agency causing mischief'. This is an error. While other uses of fiend clearly suggest only constant and obsessive conduct (as in 'a fresh-air fiend'), 'drug fiend' has other overtones, which are far from jocular.

32 NSW Police Commissioner James Mitchell in *SMH*: 11 April 1928, 15.

33 Harrison Narcotic Law 1914, Title 26, USC (USA), ss. 4701, 4705; *USA v. Doremus* (1919), 249 US 86; *Webb v. USA* (1919), 249 US 96; *USA v. Behrman* (1922), 258 US 280; *Linder v. USA* (1925), 268 US 5, 18. See also John Helmer, *Drugs and Minority Oppression*, New York: 1975; Alfred Lindesmith, *The Addict and the Law*, New York: 1965; Alfred Lindesmith, 'The Federal Narcotics Bureaucracy and Drug Policy', *Journal of Drug Issues* 8 (1978): 157–72; David Musto, *The American Disease*, London: 1973, 5–132; M. Peyrot, 'Cycles of Social Problem Development: The Case of Drug Abuse', *Sociological Quarterly* 25 (1984): 83–96.

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35 Lambert in Helmer, 15, 39. See AA: CA 7; CRS A981 Correspondence Files 1927–1942, League of Nations 46 Old Pt 1; AA: CA 10 Department of Trade and Customs; CRS A425 Correspondence Files, 57/28004 Narcotic Drugs—Annual Report on Traffic 1957; AA: CA 18 Department of External Affairs (II); A1838 Correspondence Files, 933/3/1 Drugs General, Annual Report by Australia; AONSW, Chief Secretary: General Correspondence 1959, A59/927 Annual Report on the Working of Treaties; PROV, VA 860 Chief Secretary's Office, VPRS 4723 Inwards Registered Correspondence, 62/H3586 Narcotic Drugs.

36 Collector of Customs NSW, 13 July 1916, in AA: CA 10; CRS A425 Correspondence Files, 40/5008 Drugs—Control of Habit-Forming and Dangerous Drugs—Morphia, Opium etc.

37 Dr Cumpston, 8 February 1922; other letters and memoranda, 1922–32 in AA: CA 17 Department of Health Central Office; CRS A1928 Correspondence Files, Multiple Number System, 1921–1949, 290/8, Morphine and other Narcotic Drugs, Supplies to Local Medical Practitioners (1921–1935).

38 Dr Cumpston, 14 February 1929, 1 April 1931; in *ibid.*

39 File note, 1 August 1929, in AONSW, Chief Secretary Special Bundle: Police Offences (Drugs Acts) Amendment 1928–34, 5/5413.

40 AA: CA 10; CRS A425 Correspondence Files, 42/2168 Prohibited Drugs—Supply: Dr Q. Ercole—Procedures for Supply.

41 AA: CA 10; CP 723/1 Papers Relating to Narcotic Drugs 1929–1959, Submissions &c on Drugs 1930–41; AA: CA 17; CRS A1928 Correspondence Files, Multiple Number System, 1921–1949, 290/8, Morphine and other Narcotic Drugs.

42 Cumpston, 8 April 1932, 20 March 1935, in *ibid.*

43 Dr Q. Ercole, 29 September 1935; Senior Clerk J.B. Simonds, Department of Trade and Customs, 29 January 1936, in AA: CA 10; CRS A425 Correspondence Files, 42/2168 Prohibited Drugs—Supply: Dr Q. Ercole—

Procedures for Supply.

44 Cases of Gale, Robertson, Madley & Robjent in AA: CA 10; CP 723/1 Papers Relating to Narcotic Drugs 1929–1959, Submissions &c on Drugs 1930–41.

45 *Argus*, Melbourne: 9 July 1938, 3; *SMH*: 6 June 1929, 8; 11 July 1931, 7; 11 May 1928, 6; 7 September 1929, 11.

46 Senior Constable Brown, in PROV, VA 860 Chief Secretary's Office, VPRS 3992 Inwards Registered Correspondence Part III, 37/176; Tasmanian Premier to Prime Minister, 22 January 1937, in AA: CA 7 Department of External Affairs (I); CRS A981 Correspondence Files Alphabetical Series 1927–1942, League of Nations Opium 31; Cumpston, 5 & 27 November 1935, in AA: CA 17; CRS A1928 Correspondence Files, Multiple Number System, 1921–1949, 290/8, Morphine and other Narcotic Drugs, and March 1935, in AA: CA 10; CP 723/1 Papers Relating to Narcotic Drugs 1929–1959, Submissions &c on Drugs 1930–41.

47 McCoy, 42 & 92; *2nd Opium Conference Summary of Information with Regard to the Production and Manufacture of ...Opium Derivatives (Years 1920–3)*, ODC 1 (C. 656 M 234. 1924 XI), in AA: CA 10; CRS A425 Correspondence Files, 40/5008 Drugs—Control of Habit-Forming and Dangerous Drugs—Morphia, Opium etc.; *Report by the Government of the Commonwealth of Australia for the Calendar Year 1930* and ... *1931* in AA: *CA 18*; CRS A981 Correspondence Files, League of Nations 46 Old Pt. 1; *Report of the Federal Health Council of Australia, 7th Session*, Canberra: 1934, in AA: CA 18; CRS A981 Correspondence Files, League of Nations Opium 59; AA: CA 10; CP 723/1, Submissions &c on Drugs 1930–1941; AA: CA 17.

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51 McCoy, 42 & 92; NSW Premier, 7 September 1934, WA Premier, 31 July 1934, Victorian Premier, 25 September 1934, Prime Minister Joe Lyons 4 January 1935; see also *Report of the Federal Health Council of Australia, 7th Session*, Canberra: 1934; all in AA: CA 18; CRS A981 Correspondence Files, League of Nations Opium 59; AA: CA 17; CRS A1928 Correspondence Files, 610/3 League of Nations Consumption of Drugs (1936–8).

52 *Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs signed at Geneva June 26th 1936*, articles 2 & 6–9.

53 *R. v. Burgess; ex parte Henry* (1936) 55 CLR 608, 669 *per* Dixon J., 658 *per* Starke J., 696 *per* Evatt & McTiernan JJ., 640 *per* Latham J; see also *Commonwealth v. Tasmania* (1983) 46 ALR 625; see also Leslie Zines, *The High Court and the Constitution*, Sydney: 1981, 220–30, esp. 222–3.

54 Opinion of G. Knowles, 30 March 1938, in AA: CA 10; CRS A425, 67/06994.

55 Senator Henty, *CPD, 16 Eliz. II Vol. S. 35*, 352.

56 Comptroller-General Abbott, 28 February 1935; Departmental Summary of Premiers' Replies, 25 January 1938; in AA: CA 18; CRS A981 Correspondence Files 1927–1942, League of Nations Opium 31.

57 Secretary of the Department of External Affairs (see also 2nd Assistant Secretary Costieau, Attorney-General's Department, 18 January 1937); Comptroller-General H. Morris; in AA: CA 5 Attorney-General's Department; CRS A432 Correspondence Files, 34/170 Convention for the Suppression of Illicit Traffic in Dangerous Drugs (1934–1938).

6 *Conventional Wisdom*

1 AA: CA 42 Department of External Territories (I) Central Office 1941–1951; CRS A518 Correspondence Files, N856/1/5 Conventions. Dangerous Drugs, Illicit Trafficking.

2 Correspondence 1940–41 in AA: CA 18 Department of External Affairs (II); CRS A981 Correspondence Files, League of Nations Opium 52.

3 See T.R. Reese, *Australia, New Zealand and the United States: A Survey of International Relations, 1941–1968*, London: 1969; and Joe Camilleri, *Australian–American relations: The Web of Dependence*, Melbourne: 1980, esp. 1–10.

4 *Opium Convention signed at the Hague, 23 January 1912*, articles 6 & 9; *International Convention Adopted by the Second Opium Conference (League of Nations), and Protocol Relating Thereto, Geneva, 19 February 1925*, article 5; see also *Agreement Concerning the Suppression of the Manufacture of, and Internal Trade in and use of, Prepared Opium signed at Geneva 11 February 1925.*

5 Cabinet briefing for 20 October 1943, in AA: CA 12, Prime Minister's Department; A1608 Correspondence Files 1939–1945, A23/2/13 Opium; AA: CA 18; A1066 Correspondence Files 1945, IC 45/51/1/9 League of Nations Dangerous Drugs Conference.

6 QSA: A/4222, Department of Health and Home Affairs, General Correspondence, 41/6524 Poisons; AONSW, Chief Secretary: General Correspondence 1953, 12/7868, A53/668 Application by Andrew Ungar.

7 Interview with J.G. Starke, Friday, 11 August 1989; AA: CA 12; A461 Correspondence Files, 3rd system 1934–50, J302/1/3 Opium Poppy 1940–48.

8 Medical Equipment Control Committee, 5 February 1946; Director-General of Health A.J. Metcalfe, June 1947; Comptroller-General J.J. Kennedy, 5 July 1945; Drug Houses of Australia; Prime Minister Ben Chifley to State Premiers, 30 July 1947; in AA: CA 12; A461 Correspondence Files, 3rd system 1934–50, J302/1/3 Opium Poppy 1940–48.

9 *Protocol Signed at Lake Success, 11 December 1946*; AA: CA 18; A1838 Correspondence Files, 933/1/3 Pt. 1 Drugs General, UN Narcotic Drugs.

10 *International Convention Adopted by the Second Opium Conference (League of Nations), and Protocol Relating Thereto, Geneva, 19 February 1925*, article 10; UN, ECOSOC, *Economic and Social Council, Official Records Supp. 2, Report of the Commission on Narcotic Drugs*, 1948: E/798, 13.

11 AONSW, Chief Secretary: General Correspondence 1956, 12/7926, A56/712 Control of Pethidine &c; C.L. 6. 1945. XI; *Commonwealth of Australia Gazette*, 1 March 1945; AA: CA 10; CRS A425 Correspondence Files, 58/23167 Narcotic Drugs—Extension of Control to New Drugs 1928–1949.

12 Metcalfe, 19 March 1946; see also Metcalfe, 17 October 1946; in *ibid.*

13 See summary of State opinions, 19 March 1946; Kennedy [no date] 1947; 31 March 1947; Metcalfe, 14 March 1947; in *ibid.*

14 *Victorian Government Gazette*, 16 June 1948; see also *Queensland Government Gazette*, 27 September 1948; *NSW Government Gazette, No. 21*, 27 February 1948; AONSW, Chief Secretary: General Correspondence 1956, 12/7926, A56/712 Control of Pethidine &c.; Ben Chifley, 10 November 1947, in AA: CA 10; CRS A425 Correspondence Files, 58/23167 Narcotic Drugs—Extension of Control to New Drugs 1928–1949.

15 AA: CA 17 Department of Health; CRS A1658 Correspondence Files, 276/1/16 Drugs and Medicines—General Narcotics.

16 PROV, VA 467 Premier's Department, VPRS 1163 Inward Correspondence 1883–1967, P68/2246 Control of Drugs; see also AA: CA 18; A1838 Correspondence Files, 933/3/1 Drugs General, Annual Report by Australia on the Working of International Treaties on Narcotic Drugs.

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Conclusion: Voices in the Wilderness?

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From Mr Sin to Mr Big **is a compelling legal and social history of the origins and development of drug laws in Australia. It argues that the selective enactment of 'drug' laws has been driven by fear, racism, powerful international pressures, and the vested interests of the medical profession, bureaucrats and politicians, rather than by genuine concerns about the welfare of users.**

Behind the emotion and controversy that surround the use of illegal drugs lie previously unexamined assumptions about how and why certain substances — such as opium, heroin and cannabis — have been prohibited, while others — such as alcohol and tobacco — have not. This book challenges these assumptions, while also examining the power and efficacy of law as a means of achieving social change.

Desmond Manderson traces the legislative developments, from the anti-opium laws directed against the Chinese in the nineteenth century, to the complex web of our present drug laws, and illustrates the gradual politicisation of the drugs debate. ***From Mr Sin to Mr Big*** **argues that Australia's current drug laws are a product of the past, and it is only by understanding this past that we can begin a rational debate about reform in the future.**

Desmond Manderson is a lawyer and historian who has written extensively on drug history and policy. After studying and teaching at the Australian National University in Canberra for several years, he is currently engaged in research at the Centre for Medicine, Ethics, and Law at McGill University in Montréal, Canada.

ISBN 0-19-553531-6

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OXFORD UNIVERSITY PRESS